UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of:	x	Chapter 11
LEHMAN BROTHERS HOLDINGS INC., ET AL.,	x	Case No. 08-13555(SCC)
	x	(Jointly Administered)
Debtors.	x	
In the Matter of:	x	
LEHMAN BROTHERS HOLDINGS INC.,	x	Case No. 08-01420(SCC)
Debtor.	x	(SIPA)
In the Matter of:	x	
LEHMAN BROTHERS HOLDINGS INC., ET AL.	x	
v.	x	Adv. Case No. 13-01554
GIANTS STADIUM LLC	x	
In the Matter of:	x	
MOORE MACRO FUND, ET AL.,	x	
v.	x	Adv. Case No. 14-02021
LEHMAN BROTHERS HOLDINGS INC., ET AL.	x	

U.S. Bankruptcy Court

One Bowling Green

New York, New York

July 16, 2014

10:08 AM

B E F O R E :

HON. SHELLY C. CHAPMAN

U.S. BANKRUPTCY JUDGE

HEARING re Trustee's Objection to the General Creditor Proof of claim of Sofia Frankel (Claim No. 4909)[LBI ECF No. 8425]

HEARING re Debtors' Motion for Alternative Dispute Resolution Procedures Order for Indemnification Claims of the Debtors Against Mortgage Loan Sellers [ECF No. 44450]

HEARING re Four Hundred Sixty-Sixth Omnibus Objection to Claims (No Liability Claims)[ECF No. 44487]

HEARING re Debtors' Objection to Proofs of Claim Filed by 2138747 Ontario Ltd. and 7895778 Canada Inc. (claim Nos. 33583 and 33586)[ECF No. 18397]

HEARING re Three Hundred Twenty-Third Omnibus Objection to Claims (Late-Filed Claims)[ECF No. 29295]

HEARING re Lehman Brothers Holdings Inc., et al. v. Giants Stadium LLC [Adversary Proceeding No. 13-01554] Pre-Trial Conference

HEARING re Moore Macro Fund, et al. v. Lehman Brothers Holdings Inc., et al. [Adversary Proceeding No. 14-02021] Pre-Trial Conference

Transcribed by: Dawn South and Nicole Yawn

A P P E A R A N C E S :

WEIL, GOTSHAL & MANGES LLP
Attorneys for LBHI
767 Fifth Avenue
New York, NY 10153-0119

BY: RALPH I. MILLER, ESQ.
SUNNY SINGH, ESQ.
STEPHEN A. YOUNGMAN, ESQ.
MAURICE HORWITZ, ESQ.
ERIKA DEL NIDO, ESQ.
RICHARD W. SLACK, ESQ.

WOLLMUTH MAHER & DEUTSCH LLP
Special Counsel to LBHI
One Gateway Center
Newark, NJ 07102

BY: JAMES N. LAWLOR, ESQ.
ADAM M. BIALEK, ESQ.

JONES DAY
Attorneys for LBHI
222 East 41st Street
New York, NY 10017-6702

BY: JAYANT W. TAMBE, ESQ.
TRACY V. SHAFFER, ESQ.

HUGHES HUBBARD & REED LLP
Attorneys for the SIPA Trustee
One Battery Park Plaza
New York, NY 1004-1482

BY: JORDAN E. PACE, ESQ.
ROBERT B. FUNKHOUSER, ESQ.

SHENWICK & ASSOCIATES
Attorney for Sofia Frankel
655 Third Avenue
20th Floor
New York, NY 10017

BY: JAMES H. SHENWICK, ESQ.

FOLEY & LARDNER LLP
Attorney for Sellers
90 Park Avenue
New York, NY 10016

BY: DEREK WRIGHT, ESQ.

MACAULEY LLC
Attorneys for Conway Hospital
300 Delaware Avenue
Wilmington, DE 19801

BY: ANDREW WHITE, ESQ.
THOMAS G. MACAULEY, ESQ.

DICKSTEIN SHAPIRO LLP
Attorneys for Claimants
1633 Broadway
New York, NY 10019-6708

BY: SHAYA M. BERGER, ESQ.
DEBORAH A. SKAKEL, ESQ.

BLANK ROME LLP
Attorney for Sterns Landing Inc.
The Chrysler Building
405 Lexington Avenue
New York, NY 10174-0208

BY: TIMOTHY W. SALTER, ESQ.

SULLIVAN & CROMWELL LLP
Attorneys for Giant Stadium
125 Broad Street
New York, NY 10004-2498

BY: MATTHEW A. SCHWARTZ, ESQ.
THOMAS JOHN WRIGHT, ESQ.

SCHLAM STONE & DOLAN LLP
26 Broadway
New York, NY 10004

BY: JEFFREY M. EILENDER, ESQ.
BENNETTE D. KRAMER, ESQ.

P R O C E E D I N G S

THE COURT: Good morning, please have a seat. How is everyone today?

Okay, let's take the agenda in the order in which the items are listed.

MR. PACE: Good morning, Your Honor.

THE COURT: Good morning.

MR. PACE: Jordan Pace of Hughes Hubbard & Reed for the SIPA Trustee for Lehman Brothers Inc.

I know Your Honor has a full calendar today, mostly with LBHI materials, and the holdings company has allowed us to go first.

We're here today on one contested matter and that's the trustee's objection to the claim of Sofia Frankel.

THE COURT: Okay.

MR. PACE: It's a claim from a former LBI broker --

THE COURT: All right.

MR. PACE: -- for five and a half million dollars of indemnification.

Before I get into the substance, because the procedural history is a big complexity I'd just like to go through that.

THE COURT: Okay.

MR. PACE: What happened is that we filed an objection back in March.

THE COURT: Right.

MR. PACE: And Ms. Frankel filed a response to that, but she also filed an amended claim --

THE COURT: Right.

MR. PACE: -- before we had a chance to reply.

The parties stipulated that Ms. Frankel would withdraw the original claim and in turn we agreed to treat her amended claim as timely.

We then filed a supplemental objection and gave Ms. Frankel plenty of time to respond to that. She did not file a response to that so in reality the supplemental objection itself is uncontested. But just to be sure we filed our reply and we're here.

So to be clear the only live claim and the one that we are seeking to have disallowed is the amended claim, that's number 6430.

THE COURT: Okay.

MR. PACE: So turning to the substance of the claim. As I mentioned the entire claim is for indemnification. Five and a half million dollars broken into only two and a half million dollars that is the actual underlying award.

THE COURT: Right.

MR. PACE: There's 1.7 million of interest, there's 500,000 of attorneys' fees --

THE COURT: Right.

MR. PACE: -- and then there's an undesignated $844,000 payment. Now --

THE COURT: It's unclear -- with respect to that payment it's unclear -- the trustee's position that it's unclear whether in fact that application of that capital account actually was even paid over?

MR. PACE: Well, Your Honor, what we understand is that there has been litigation -- much litigation between Ms. Frankel and the underlying claimants, and part of that and the decision we included is that the only value that can be counted towards the payment of the award is cash actually received by the claimants, by --

THE COURT: Right.

MR. PACE: -- Sardis & Jazz (ph). We understand that they've received about half of what's being claimed here and the rest is likely the value of the account that was turned over, which the Court said isn't what counts, but we also say that's all postpetition interest.

So stepping back and looking at the claim from a high level since its only indemnification under both Delaware law and LBI certificate there's no right to indemnification until there's this determination that

Ms. Frankel acted in good faith and in a manner she reasonably believed to be in the best interest of LBI.

Now Ms. Frankel was accused by Sardis & Jazz of fraudulently misrepresenting her qualifications and her past performance and also fraudulently churning their accounts. Those were the allegations in the FINRA arbitration --

THE COURT: Right.

MR. PACE: -- and the FINRA arbitration found Ms. Frankel liable based on those allegations. So she was found liable based on her own fraudulent conduct.

And the subsequent court decisions both in New York State Court on the confirmation of the award and in Federal Court when Ms. Frankel sued her attorney from the arbitration confirmed that fact.

And furthermore in Ms. Frankel's response she admits that those subsequent court decisions said that she had committed fraud. She says that the judges therein erred in finding that she committed fraud, so it's the admission of the finding --

THE COURT: Right.

MR. PACE: -- it's just that essentially she wants to relitigate it for by my count is at least the third time. But thankfully we have collateral estoppel to say that she can't do that. Because of the arbitration award, because of the court findings Ms. Frankel is collaterally estopped from

denying that she acted fraudulently, and because she acted fraudulently she cannot get any indemnification under Delaware law or the certificate of incorporation.

The fraudulent representations themselves are bad faith per se, it -- there's also no way that Ms. Frankel defrauding her clients was in LBI's best interest.

In terms of the fraudulent churning. Fraudulent churning is a form of federal securities fraud and the Second Circuit has said that one cannot be indemnified for federal securities fraud.

So Ms. Frankel cannot meet the standard for indemnification and therefore her claim is unenforceable against LBI and that's why we're seeking to have it disallowed in its entirety.

In our papers we also address various other reasons.

THE COURT: Right.

MR. PACE: Chief among those is the fact that as I mentioned there has to be an actual determination that she met that standard, and putting aside for the moment the fact that Ms. Frankel cannot met that standard and a determination cannot be made in her favor no determination has been made. That's undisputed. So it's a contingent claim for reimbursement and it's barred under Section 502(e)(1)(b) of the Bankruptcy Code.

Add to that the fact that most of the amounts have not been paid at all then it's doubly contingent and again must be disallowed.

So, Your Honor, I can get into the details of why each component of the claim --

THE COURT: Well in addition -- additionally I think you had a break down of all the attorneys' fees and pointed out among other things that many of the categories of those fees had nothing to do with the original litigation.

MR. PACE: That's correct, Your Honor. That, it's not properly documented, we had to go searching the public record and searching all these court cases to find what these fees related to because there was no documentation to support them as is required under Second Circuit precedent.

THE COURT: Okay. Why don't I hear from Mr. Shenwick.

MR. PACE: Yes, Your Honor.

THE COURT: Thank you.

Good morning.

MR. SHENWICK: Good morning, Your Honor, James Shenwick representing Sofia Frankel.

Your Honor, what this case is about is the debtors' failure to honor contractual indemnification.

THE COURT: No, Mr. Shenwick, what this case is

about is a position that in my mind almost certainly violates Rule 11. That's what this case is about.

I find the position that's taken here shocking, just shocking. You go through it step by step. There was a FINRA arbitration award that was then confirmed.

Your position is that because under the arbitration rules the grounds are not specified therefore the appellate decision confirming the award was wrong because it found that she had committed fraud.

There are -- in addition what you're telling me is that Judge Batts when she dismissed the malpractice claim also got it wrong when she said that there was fraud.

So out of the box there's been a finding that cannot be collaterally attacked that she engaged in fraud.

MR. SHENWICK: The FINRA award was for compensatory damages, there was no finding of fraud. If there had been a finding of fraud there would have been --

THE COURT: That's not --

MR. SHENWICK: -- punitive damages --

THE COURT: That's not the way --

MR. SHENWICK: -- awarded, which there were not.

THE COURT: -- arbitration works. Your remedy would have been to take that further up on appeal. I am not going to revisit that. What you're telling me is that I should now have a trial on the issue of her good faith.

That's essentially what you're telling me, right? I mean that --

MR. SHENWICK: I think the record is clear that there was good faith based on the arbitrators' 4 years, 37 sessions where they found compensatory damages only, no punitive damages and no fraud.

THE COURT: You're making -- Mr. Shenwick, but you're making that up.

MR. SHENWICK: No --

THE COURT: There is a --

MR. SHENWICK: -- I have the FINRA award right here, Your Honor, I'm not making it up.

THE COURT: No. No, what you're making up is --

MR. SHENWICK: It's right here.

THE COURT: -- the fact that the allegations -- the allegations that were the subject of the arbitration were that she engaged in fraudulent conduct and she churned. Okay? So therefore --

MR. SHENWICK: Those were allegations, not the findings. It's the kitchen sink pleading. I defended and commenced securities arbitration actions. You throw in all the complaints you have, you hope something sticks to the wall. Three arbitrators, 37 sessions over 4 years paid for by Lehman, Lehman management told her she had done a good job and done nothing wrong. Mr. McDunna (ph), the attorney

who defended her at Drinker Biddle, wrote a letter of recommendation to UBS and said she had done nothing wrong.

THE COURT: I'm not relitigating the FINRA arbitration, I'm not ignoring the findings that were made by three other courts that she engaged in fraudulent conduct and churning.

MR. SHENWICK: Two courts, Your Honor. And --

THE COURT: And Deborah Batts. The Supreme Court confirmed the award --

MR. SHENWICK: I said two courts, Your Honor. There were two hearings, State Court and Federal Court.

THE COURT: Right, but there was a confirmation of the award, correct?

MR. SHENWICK: Yes.

THE COURT: By which court?

MR. SHENWICK: State Court.

THE COURT: There are -- which State Court? New York Supreme, right?

MR. SHENWICK: Yes, correct.

THE COURT: Okay. And then that went up to the appellate term, right?

MR. SHENWICK: Correct.

THE COURT: Okay. That's two State Courts.

MR. SHENWICK: Right.

THE COURT: Then there's Deborah Batts in --

MR. SHENWICK: Federal.

THE COURT: -- the Federal Court when she sued for malpractice.

MR. SHENWICK: Correct, Your Honor.

THE COURT: Right? So now you're asking me to number one -- I mean it's an astonishing request, right? She hasn't paid all these amounts, she --

MR. SHENWICK: She has, Your Honor, I'm sorry.

THE COURT: She's paid two and a half million dollars?

MR. SHENWICK: No, she's paid three components of the claim. Her condominium that was valued at $1 million was sold four weeks ago, I have the sheriff sale papers. The net to Sardis' was $960,000. She had three brokerage accounts which she turned over and the payment of legal fees.

May I approach, Your Honor, I have the sheriff sale papers here? I have copies for everyone.

THE COURT: Mr. Shenwick, I'm really not interested in them.

MR. SHENWICK: The sheriff sale --

THE COURT: I'm not interested in them.

MR. SHENWICK: Okay. What are you interested in, Your Honor?

THE COURT: I'm interested in the fact that among

the things that she claims are attorneys' fees in connection with her asset protection plan. Attorneys' fees that have nothing to do with the defense of her conduct in the FINRA arbitration, that have nothing to do with her employment with Lehman.

MR. SHENWICK: Your Honor --

THE COURT: Making a claim of that nature implicates Rule 11, also implicates the bankruptcy crime and fraud statute.

You don't get to as you say throw in the kitchen sink when you make claims in this court. That's not the way it works.

MR. SHENWICK: Understood, Your Honor, it was in error and she's correcting that. She paid substantial amount of legal fees to over four law firms, and I have a spreadsheet with those totals. Yes, there was some mistakes there. She's a single woman in Florida and she miscounted. She's paid over 10 law firms here over 498,000. She may have thought that asset protection planning was related to the -- an indemnification because without the Sardis claim she would not have done the asset protection planning. Four hundred and ninety-eight thousand give or take. The condominium sale, I have the sheriff's papers here. Three brokerage accounts, Barclays, MB Private Funds, and Lehman Private Equity, 844,000.

This is not a contingent claim, this is not double counting. This is a woman who wants to be indemnified. She in good faith has made payment to the Sardis', Lehman has not. She wouldn't have taken the job at Lehman without an indemnification.

THE COURT: But I --

MR. SHENWICK: Her boss told her she did nothing wrong. McDunna, the attorney who represented her for four years wrote a letter to UBS, I have that letter here as well, Your Honor, it's Drinker Biddle letterhead and it's signed and executed.

She deserves to be reimbursed not a penny more than she's expended. She had an indemnification, the indemnification should be honored by this Court.

THE COURT: I absolutely agree the indemnification should be honored to the extent that under applicable law by its terms she is entitled to indemnification. She is not. She was found in a FINRA arbitration liable, the award was confirmed, three courts --

MR. SHENWICK: For compensatory damages. I have it right here, Your Honor.

THE COURT: There is no distinction -- the distinction between the award of compensatory and punitive damages does not matter. The allegation --

MR. SHENWICK: There was no finding of fraud. I'd

like to ask you if --

THE COURT: That's not --

MR. SHENWICK: -- if there were allegations of churning and fraudulent representations why did the three arbitrators who were paid a substantial amount of money not find that? They found compensatory damages.

THE COURT: Apples and oranges, Mr. Shenwick. That's not the --

MR. SHENWICK: It's not, it's apples and apples and orange and orange, Your Honor. Compensatory damages. They would have found punitive damages and they would have found fraudulent behavior.

THE COURT: What was -- what was she -- what did the Sardis need to be compensated for?

MR. SHENWICK: Compensatory damages.

THE COURT: That's not -- that's not a -- that's a description of what they got. They needed to be compensated for the damages that they sustained because she engaged in fraudulent conduct and churning that --

MR. SHENWICK: From the biggest tech meltdown in the history of this country. The Sardis' were professional day traders as well, they were technology people. All five cases that were brought, she won four and lost one, all of them involved people that were married or worked for the Sardis', Your Honor. That's what McDunna said, that's why

there was the finding of no fraud and finding of no punitive damages. The Sardis' had losses.

Your Honor, she deserves and is entitled to be compensated, she has out-of-pocket damages. Granted she made a mistake on the legal fees, we're correcting that. I've instructed her, she's working on a revised sheet with invoices, canceled checks, and back up. She's lost her condominium. She's lost her life here. She's paid legal fees. She's handed over the brokerage fees to the Sardis'. She's acted in good faith.

THE COURT: Do you think an asset protection plan is an indication of somebody who's acting in good faith?

MR. SHENWICK: It was a --

THE COURT: You know what we call an asset --

MR. SHENWICK: -- minimal expense --

THE COURT: You know what we call --

MR. SHENWICK: -- and it's allowed to be done.

THE COURT: Do you know what we call an asset protection plan around here?

MR. SHENWICK: No.

THE COURT: A fraudulent conveyance.

MR. SHENWICK: It's not. It's not. She did nothing. She's turned over her assets as required pursuant to the judgment and New York State law, and I have proof of that here because I have the sheriff sale right here.

THE COURT: Did you think it would have been a good idea to respond to the trustee's supplemental objection?

MR. SHENWICK: No, because I think it was a rehashing of prior papers and it was filled with mistake and omissions that I thought I could correct on the record today.

THE COURT: Well, thank you, have a seat.

MR. PACE: Your Honor, just to briefly address some of the points Mr. Shenwick raised.

We were caught completely by surprise with a lot of what Mr. Shenwick has raised in terms of the fees and the amounts, and according to what Mr. Shenwick said the sheriff sale, which he was aware of, came before his deadline to respond to the supplemental objection. So in our view there is no excuse for not including that.

I'd also like to address Mr. Shenwick is trying to make this a case about the equities rather than the law. The law is clear that Ms. Frankel cannot get indemnification.

But also when Mr. Shenwick said just now that there was no fraudulent conveyance the New York Supreme Court and the appellate division both found specifically that the transfer of Ms. Frankel's condominium to her son was indeed a fraudulent conveyance.

According to what Mr. Shenwick is claiming now she's lost that condominium, but also as part of that asset protection plan she liquidated her cash accounts or her fidelity account and she has a condominium on the beach in Miami. So it's not as if without indemnification Ms. Frankel would be homeless.

THE COURT: Okay. But that -- all of that goes to as you say the equities --

MR. PACE: Uh-huh.

THE COURT: -- and it really has nothing to do specifically with the entitlement to indemnification.

MR. PACE: Yes, Your Honor.

THE COURT: That's a different set of facts that indicate or reflect conduct that's not in good faith, right?

MR. PACE: Yes, Your Honor.

THE COURT: Okay.

MR. PACE: And we believe circumstantial evidence of fraud that has gone on before.

THE COURT: Can you address the -- can you address the point that the compensatory versus punitive? In other words, Mr. Shenwick would like me to ignore all three statements by other courts that said she engaged in fraud and instead look at the arbitration award and determine that because it awarded only compensatory damages and not punitive damages therefore it must have been based on

something other than a finding of fraud and churning?

MR. PACE: Your Honor, to address that back to what we said in our papers is that the award has to be based on the allegations because it's a matter of contract, so it's only what the parties are going to submit, and there's no doubt that the compensatory damages award was based on the findings of fraud as alleged in the statement of claim.

In terms of why there was no award of punitive damages. We don't have any basis to make a determination as to what the basis was for that, because as Mr. Shenwick pointed out the award is unreasoned. So there's no necessary implication about what happened with punitive damages as there is with her liability for fraud.

So it's really not an answer, but the effect of what Mr. Shenwick is saying is that Ms. Frankel didn't do anything. The only allegations were fraud and fraudulent churning, and so if that's not what she was found liable for then she wasn't found liable for anything because she didn't do anything, and that's essentially Ms. Frankel's position, which is totally contrary to everything in the record.

THE COURT: What about the suggestion that in real-time her superiors at Lehman were saying you're going great?

MR. PACE: Sure, Your Honor. The -- in the response Ms. Frankel points to a meeting that occurred on

October 31st, 2008, which is about a month and a half after Lehman ceased operating, by that point Ms. Frankel was at Barclays. So that is really irrelevant to anything because that's not about LBI, that's not about what she did at LBI, it's about looking forward at Barclays where she was then.

Also I would point out that as I believe it was Judge Batts found when the arbitration was pending the interest of Lehman and Ms. Frankel were aligned. The interests were to try and prove, despite what the facts turned out to be, that Ms. Frankel did not commit fraud. And so any attorney who's involved in litigation will counsel his client that you're a main witness, you're a co-defendant, you don't want to anger them by telling them that you messed up, you defrauded our clients, and now we're all in hot water for that.

Until interest diverge when you're co-litigating, when you are -- have a common interest you work together and you try and make everything as harmonious as possible.

It's not in the response, it's not in the standard of claim that there were such statements while LBI was still operating, so it's really conjecture at this point.

THE COURT: Okay, thank you.

All right, Mr. Shenwick, briefly, anything more?

MR. SHENWICK: Your Honor, I dispute that and again I would direct --

THE COURT: What's the -- what's the that that you dispute?

MR. SHENWICK: That management made self-serving statements. They could have fired her, they could have said our conflicts are diverse we can't have Drinker Biddle paying your legal fees and defend you, you have to hire your own counsel. They didn't. In fact Peter McDunna, the partner of Drinker Biddle, wrote a letter of explanation and indicated that she had done nothing wrong. The letter is dated September 17th, 2008, it's executed and signed on Drinker Biddle letterhead. That's -- Drinker Biddle was counsel for Lehman and Ms. Frankel in this arbitration, 4 years, 37 hearings.

THE COURT: Okay, you now both have me confused. What -- place this in a time frame, this letter.

MR. PACE: Sure, Your Honor. That letter I believe was during the pendency of --

THE COURT: During the --

MR. PACE: While Lehman was still operating.

THE COURT: While the --

MR. SHENWICK: No. Well, it was certainly during the pendency of the arbitrations.

THE COURT: Right, which is -- which was exactly the point. That during the pendency of the arbitration when you have the kind of situation that you had where an

employee is accused and there is a need to defend the parties remain aligned.

MR. SHENWICK: That's a rewrite of history, Your Honor. Oftentimes the employee is fired and escorted out the door by security guards.

THE COURT: Well now we're -- now we're into --

MR. SHENWICK: They kept her for four years, Your Honor.

THE COURT: Now we're into make pretend land. Now we're into your selective mention or description of things that might or might not happen elsewhere.

MR. SHENWICK: I have a letter from a partner defending her and Lehman, Your Honor.

THE COURT: That's fine. That's fine.

The primary thing that we have here is an arbitration decision which was not reasoned, which was premised on allegations of fraud and churning, and pursuant to which there was an award that was made. It necessarily implied that Ms. Frankel had in fact committed fraudulent conduct and churning.

The confirmation of the award by the Supreme Court and the subsequent Appellate Court that reviewed the confirmation of the award each found that in fact there was fraud and that there was churning.

To add one more piece of support to the notion

that we cannot here revisit whether or not there was fraud or churning that occurred there is the observation of Judge Batts in the Southern District of New York case in which Ms. Frankel sued her attorney for malpractice in which Judge Batts also observed and found that Ms. Frankel had committed fraud and churning.

Those findings are entitled to collateral estoppel effect, therefore there would be -- it would be wholly improper to have any sort of a proceeding on this claim in which there would be an open issue, if you will, as to whether or not she acted in good faith and therefore was entitled to indemnification. That issue has been determined in a way that's entitled to collateral estoppel. In fact accordingly under the governing documents and applicable law she's not entitled to indemnification.

And just to put a fine point on it, but this does not separately form a basis for the opinion, the submission of patently false claims for indemnification and the failure to come forward in a timely fashion with additional points and evidence is really quite inexcusable. It wastes counsel time, it wastes the Court's time. But the good news is that I'm not going to impose any sanctions.

I would ask that you -- that the trustee prepare an order, share it with Mr. Shenwick, and send it to us for our consideration.

MR. PACE: Yes, Your Honor.

THE COURT: All right? Thank you. Thank you, Mr. Shenwick.

MR. SHENWICK: Thank you, Your Honor.

MR. PACE: Your Honor, I believe up next is the Wollmuth firm --

THE COURT: Yes.

MR. PACE: -- for the continuations.

THE COURT: Very good. Thank you.

MR. PACE: Thank you.

(Pause)

THE COURT: Good morning. How are you?

MR. LAWLOR: Good morning, Your Honor. James Lawlor, Wollmuth Maher & Deutsch on behalf of -- as special counsel on behalf of Lehman Brothers Holdings Inc., and with me is my partner, Adam Bialek.

MR. SALTER: Good morning, Your Honor, Timothy Salter, Blank Rome, for Stearns Lending Inc.

THE COURT: Okay, thank you.

MR. LAWLOR: Your Honor, we're here on the continued motion from June 19th --

THE COURT: Right.

MR. LAWLOR: -- on the debtors' indemnification and ADR procedure.

THE COURT: Right.

MR. LAWLOR: I'm happy to say that we've resolved several of the objections.

THE COURT: Okay.

MR. LAWLOR: We do have black line copies of orders for Your Honor. If you wish them I can hand them up now.

THE COURT: That would be -- that would be great.

MR. LAWLOR: All right. We have three to hand up.

THE COURT: Are we all resolved or do we have one unresolved?

MR. LAWLOR: No, we have -- for purposes of today we have four of the objectors resolved and the rest are adjourned.

THE COURT: Okay.

MR. SALTER: Yeah, we resolved last night, I just came in --

THE COURT: Wonderful.

MR. SALTER: -- to get it on the record.

THE COURT: Okay. Very good. Thank you.

MR. LAWLOR: Just briefly, Your Honor.

The -- as Your Honor knows on June 19th Your Honor approved the ADR procedure with respect to the non-objecting parties. We had multiple objections which we agreed to try to resolve consensually.

The four that are resolved by those three orders

involve the Universal mortgage parties, DHI, Mortgage IT, and Stearns Lending.

And quickly I'll just outline some of the -- what are substantive I think changes that Your Honor should be aware of.

With respect to the universal mortgage and DHI order we had been negotiating with Bills & Sunberg (ph), which is counsel for those parties. Essentially the substantive change really begins in paragraph 10 of the decretal part, at subparagraph D on page 9.

THE COURT: Okay.

MR. LAWLOR: We've agreed that we will agree to either New York or a mutually agreeable location for purposes of the arbitration -- I'm sorry --

THE COURT: Mediation.

MR. LAWLOR: -- mediation.

THE COURT: Okay.

MR. LAWLOR: I don't want to make it more important than it is, Your Honor.

And so we'll -- obviously if we send the notices out we'll agree at that point to what we need to do.

We also in paragraph 14 on page 11 we clarified that the right to removal, which is referenced in that paragraph, it's not expanding the right. If we have the right to remove a case we have the right, we're not

suggesting that that order extends that right if one does not exist.

Paragraph 17, Your Honor, on page 12 of that order provides that in exchange for the mediation taking place in New York LBHI will pick up the fees and costs of the mediator. If we ultimately agree to have it somewhere else then it'll remain a shared cost.

And then I believe --

THE COURT: You have a typo.

MR. LAWLOR: Yes, exastant (sic)?

THE COURT: What's that?

MR. LAWLOR: Exastant.

THE COURT: Yes.

MR. LAWLOR: Thank you, Your Honor.

What we're going to do is we're going to -- we'll send down copies of --

THE COURT: Okay.

MR. LAWLOR: -- clean copies of the order as well, Your Honor.

THE COURT: Is that -- does that reflect the concern that New York mediators are more expensive than non-New York mediators?

MR. LAWLOR: I -- well, I think the idea is that, Your Honor, if we're still going to use the same mediators and they're going to have to travel then if that's what the

accommodation that the other party wants to make then that cost is going to go up for them if they have to share that. If we do it here then LBHI will pick up that cost.

THE COURT: Okay.

MR. LAWLOR: It seemed like a fair trade off, Your Honor.

THE COURT: Okay.

MR. LAWLOR: And those are essentially substantive changes I believe --

THE COURT: Okay.

MR. LAWLOR: -- in that order.

I think the next order is the Mortgage IT order, Your Honor.

THE COURT: Okay.

MR. LAWLOR: In Mortgage IT there is a reservation in the initial paragraph.

As Your Honor is aware Your Honor made findings and conclusions about jurisdiction and parties being in front of her. What Mortgage IT asked for is that with respect to those findings that they reserve their rights, whatever they may be, with respect to those findings. Obviously if they're consenting to this order they're subject to this order, so you know, we didn't have a problem with that. I mean obviously we're governed by the terms of the order that's going to be entered, so --

THE COURT: Okay.

MR. LAWLOR: -- they're here voluntarily and I think that was a minor accommodation, Your Honor, but I did want to point that out.

In paragraph 10(c) which deals with the mediator, and it's on page I believe 8, Your Honor, of the mark up, we've agreed to choose between two mediators suggested by Mortgage IT. If for some reason those are not available -- those two mediators then we'll try to come up with a mutually agreeable one from the list, and if not we can always ask Your Honor to --

THE COURT: Okay.

MR. LAWLOR: -- to call the coin flip. Hopefully that will not be necessary and we'll all be able to do that.

Paragraph 10(f), which is on the next page, Your Honor, deals with appearances. MIT -- Mortgage IT asked that we make it clear that in the event that there was some internal governance issue that required them to get board approval of an action, even though we're at mediation in good faith --

THE COURT: Right.

MR. LAWLOR: -- that they have the right to do that.

THE COURT: Okay.

MR. LAWLOR: I think that's always assumed, but

we're fine with it. Everybody is going to be there in good faith and subject to the order so we were fine with that change.

THE COURT: Okay.

MR. LAWLOR: And I believe paragraph 16, which is the next change, Your Honor, and that's simply a clarification that -- it's on page 11 -- that participation in mediation does not waive a jury trial right.

THE COURT: Right.

MR. LAWLOR: And paragraph 17 deals with the cost of the mediator, and that's on the next page, and again, we'll agree to pick up that cost in exchange for having mediation in New York.

THE COURT: All right.

MR. LAWLOR: And those are the changes of Mortgage IT, Your Honor.

THE COURT: Okay.

MR. LAWLOR: And then the last order is the Stearns Lending order, Your Honor.

THE COURT: Right.

MR. LAWLOR: And Stearns Lending -- many of the changes are the same so I'll try to be quick on that one.

Essentially there's some general changes to deadlines but they're not substantive.

Really it's paragraph 16 and 17 that are the

changes, Your Honor. Again, it's the clarification of the jury trial language and that LBHI will pick up the cost of the mediator if -- when we have it in New York.

So I think those are all the changes --

THE COURT: Okay.

MR. LAWLOR: -- from Your Honor's prior order.

MR. SALTER: Didn't we also change that we would pick the mediator, right?

MR. LAWLOR: Oh, you know, I could be -- I think you're right, Your Honor. I think we also allowed them the option of picking from the list of mediators.

THE COURT: Let's see.

MR. LAWLOR: I think that's correct. Is that correct?

THE COURT: Choice of the mediator. Yes.

MR. LAWLOR: Yes. Which is fine, Your Honor. That's obviously from the list that Your Honor approved. It's fine with us.

THE COURT: Okay. All right. So then you will send us clean copies of these, we will enter them, and then you have two more to go and then we're done.

MR. LAWLOR: Yeah, we have several on the adjourned list I believe. There are that some of them are close to being resolved --

THE COURT: Okay.

MR. LAWLOR: -- some are not so close, but we have an August 12th return date I think for the next omnibus hearing.

THE COURT: Right. Right.

MR. LAWLOR: And obviously any stipulation that we entered into would just be carried forward to that return date.

THE COURT: Okay. I mean what you -- what you're welcome to do is, and hopefully now that you have this body of ideas that people can draw on, if you arrive at agreements you can just --

MR. LAWLOR: Submit them?

THE COURT: -- submit them.

MR. LAWLOR: That would be great, Your Honor.

THE COURT: You don't have to make a special trip for that.

MR. LAWLOR: Thank you, very much.

THE COURT: All right? Okay, thank you. We have somebody here who wants to be heard.

MR. WRIGHT: Your Honor, I just wanted to put in appearance. Derek Wright from Foley & Lardner, we represent sort of 15 of the sellers and they're on the adjourned list, so I just wanted to state that on the record.

THE COURT: Okay. As a group though you're negotiating on a --

MR. WRIGHT: As a group, correct.

THE COURT: As a group. Okay.

MR. WRIGHT: There were four different objections that we filed but those are still being negotiated and all adjourned.

THE COURT: Okay. Well, I encourage you to read these resolutions and become inspired thereby.

MR. WRIGHT: Absolutely.

THE COURT: Okay? Thank you.

MR. WRIGHT: Thank you, Your Honor.

MR. LAWLOR: Thank you, Your Honor.

THE COURT: Okay, thank you.

Okay. So the next thing we have I believe is the four hundred and sixty-sixth omnibus objection, it's a claim, specifically the claim of Mr. Matthew Lee.

Hello, Mr. Miller, good to see you.

MR. MILLER: Good morning, Your Honor. May it please the Court I'm Ralph Miller here for the plan administrator, Lehman Brothers Holdings Inc., also called LBHI.

As the Court has indicated item number 3 on the agenda is claim number 14073 by Mr. Matthew Lee subject to the four hundred and sixty-sixth omnibus objection. We're not certain whether Mr. Lee is here on not, Your Honor, we may need -- want to try to determine that. We do have clear

evidence that he had notice of the date and the -- and the hearing. I'd like to put that on the record if he's not here.

THE COURT: Okay. All right. Let me ask, the time is now 10:45, is anyone -- is Mr. Matthew Lee present in the courtroom? Is anyone here appearing on behalf of Mr. Matthew Lee present? Mr. Lee or anyone on his behalf of the telephone? Okay, so let the record reflect no response.

MR. MILLER: Thank you, Your Honor. We do know Mr. Lee was aware of the date because the four hundred and sixty-sixth objection had a notice of the hearing in it and Mr. Lee filed a response in which he acknowledges that he received that objection, in fact discussed it.

He was also made aware of this hearing in a telephone call last month on June 30th, with my colleagues, Ms. Erika del Nido, who is here today --

THE COURT: Okay.

MR. MILLER: -- and Mr. Garrett Fail, and he was told that it would proceed on a contested basis and he did not indicate anything about whether he'd be here or not in that call as I understand it.

So if I may proceed, Your Honor --

THE COURT: Please.

MR. MILLER: -- I'd like to make a brief record.

Briefly there are two parts to the claim. One

part should be disallowed the plan administrator believes, and the other should be reclassified as equity.

The first component of Mr. Lee's claim deals with two $25,000 bonds that were held in an LBI brokerage account. We think that should be disallowed. And the remainder of the claim should be classified as an equity interest under the plan because it admittedly arises from the purchase of $94,950 worth of LBHI stock bought on the last business day before the Chapter 11 was filed.

And just to clarify this claim has nothing to do with restricted stock units or contingent stock awards of the kind that are currently before the Court as -- in other omnibus objections.

All of the facts to resolve Mr. Lee's claim are contained in the claim itself or his response or are subject to judicial notice.

Let me start with the portion of the claim that seeks 50,000 for two $25,000 bonds. He says that they were risky and were purchased without authorization and were placed initially in an LBI account that he says were for college funds and there are brokerage statements attached to the claim.

That part of the claim should be disallowed because all claims related to handling of an LBI brokerage account can be asserted only in the LBI proceeding which of

course was the subject of the hearing this morning and is before this Court.

Mr. Lee's only factual or legal allegations that could possibly give rise to any basis to make LBHI responsible for a loss in risky securities or a purchase without authorization by an LBI broker is a vague reference to lack of separation in business affairs between LBI and LBHI.

In his response however Mr. Lee seems to disclaim the reliance on an alter ego theory. Referring to the alter ego discussion in the four hundred and sixty-sixth objection Mr. Lee's one-page June 15th response says, "Amounts to be disallowed 50,000. Essentially your reason relates to an LBHI v. LBI argument, this argument only." And only is in block caps. "Relate to my compensation claim and was never mentioned in this claim 14073."

THE COURT: Right.

MR. MILLER: So that disclaimer would leave Mr. Lee with no legal basis for this part of his claim.

But in any event assuming Mr. Lee is making a claim related to his LBI account and a legal theory is some sort of alter ego theory it's the law of the case that Judge Peck has repeatedly ruled and properly ruled that individual employees and shareholders have no standing to pursue these claims. Those rulings are quoted in the four hundred and

sixty-sixth objection itself and again in footnote 2 on page 3 of LBHI's reply, and those rulings are consistent with a line of cases that includes the Second Circuit's opinion in Kalb, Voorhis & Co. versus American Financial Corp., 8 3d. 130, which holds that general alter ego claims of a debtor's subsidiary against its corporate parent can only be asserted by the debtor or its trustee and that individual shareholders, claimants, creditors, and others don't have a standing to assert those claims.

So in short with regard to these two $25,000 bonds that were held in an LBI account any claims related to them should be addressed to LBHI.

I should also add, Your Honor, that Mr. Lee's claim does not state any basis for finding damages. He now says the bonds are held in a fidelity account, but he's not alleged any loss in value in the bonds. So other than some perhaps claim that there was a period of time that he wanted to sell them or not, which is speculative.

It's also true to these are said to be college investment accounts, Your Honor, so there's no indication of liquidity. So we believe there's a separate basis in addition to the fact that he couldn't claim against LBI, he hadn't shown any damages.

Moving to the second component of this claim Mr. Lee admits that he directed the purchase of 25,000

shares of LBH stock on the last business day before LBHI filed for Chapter 11 protection, but he stresses in his response that his claim is for fraud because he says the management of LBHI failed to disclose the dire financial condition of the company and he contends the management of LBHI "should not have allowed those on LBI payroll to purchase the stock without disclosing in advance of the purchase to those on the LBI payroll the severe circumstances and conditions facing the company at that time."

Mr. Lee then says, "My claim is to decay this trade and replace it in my account with the related cash amounting to $94,950 (25,000 shares at 3.75)."

That's from page 3 of his September 12, 2009 letter that came with the claim.

Now, I'm sure Your Honor knows the initials DK are slang in the brokerage business for don't know and they refer to a situation which one party to the trade asserts that it didn't know enough about the trade or it was in some way not authorizing the trade, and it is what we would legally call rescission.

And so this fact pattern fits precisely within the definition of Section 510(b) of the Bankruptcy Code of "a claim arising from the rescission of a purchase or sale of a security of the debtor or an affiliate of the debtor" or

"for damages arising from the purchase or sale of such security."

As the Court knows there's a long line of cases, some of which are cited in our reply that apply to 510(b) to fraud claims related to the purchase of shares of the debtor. And because the security was common stock under 510(b) it should have the same priority as common stock, and the proposed order would classify the 94,950 claim for alleged damages as an equity interest at the plan -- under the plan which has the same priorities as common stock.

And for reasons I explained earlier the order would disallow the $50,000 claim for the two bonds that were originally in an LBI brokerage account and are now apparently in a fidelity account.

I'm happy to take any questions Your Honor.

THE COURT: I agree with you right down the line, Mr. Miller, I don't think I could add anything more to your recitation of the facts or the reasons why these claims should be disallowed and reclassified as you indicated.

So perhaps if Mr. Lee had attended I would have been able to ask him some questions I had about these -- about the letter -- the June 15th letter that I paid particular attention to, but I found nothing in that letter that indicated that there was any meritorious basis for either part of his claim.

So if you would please submit an order I would be grateful.

MR. MILLER: We have, Your Honor. I'm advised that the CD that was originally submitted has some corrections in other orders on it, not this order.

THE COURT: Okay.

MR. MILLER: So if we may have leave to resubmit the CD with corrections --

THE COURT: Either resubmit the CD --

MR. MILLER: -- to other orders --

THE COURT: -- or just email it to chambers so we don't get confused.

MR. MILLER: Thank you, Your Honor.

THE COURT: All right.

MR. MILLER: May I be excused?

THE COURT: Yes. Thank you.

MR. MILLER: Thank you.

THE COURT: Thank you for coming down, Mr. Miller.

All right, I believe the next matter is the SkyPower matter.

(Pause)

THE COURT: Good morning. How are you?

MR. YOUNGMAN: Good morning, Your Honor. Stephen Youngman, Weil, Gotshal & Manges for LBHI as plan administrator.

Before the Court with respect to this matter are four pleadings. First the objection of Lehman Brothers Holdings Inc. to the proofs of claim filed by 2138747 Ontario Ltd. and 6785778 Canada Inc., which I'll refer to either as the claimants or the minority shareholders.

THE COURT: Okay.

MR. YOUNGMAN: Those were claim numbers 33583 and 33586.

On August 17th, 2011 the minority shareholders filed their opposition to the debtors' objection to proofs of claim, which I'll refer to as the response. And on June 3, 2014 Lehman Brothers Holdings Inc. as plan administrator filed its reply in support of its objection and in opposition to the minority shareholders' response. And as we had previously advised the Court that it would be coming on July 9, 2014, the minority shareholders filed a surreply.

It is important when reviewing this matter to keep in mind the various entities that are involved, and as I go through the presentation I'll be referring to certain specific entities.

THE COURT: Okay.

MR. YOUNGMAN: First SkyPower Corp. was the renewable energy company that was the subject of the transaction.

THE COURT: Right.

MR. YOUNGMAN: LB SkyPower was the entity that was a direct holder -- direct equity holder of SkyPower Corp. and indirectly owned through the chain ultimately to LBHI.

The minority shareholders, as I have said, are the claimants here and they were also equity holders of SkyPower Corp. LBI or Lehman Brothers Inc. is one of the transaction parties and of course LBHI or Lehman Brothers Holdings Inc.

This transaction was an investment in a renewable energy developer in Canada. This transaction closed in June 2007 resulting in LB SkyPower acquiring a controlling interest in SkyPower Corp. and the minority shareholders receiving 87 and a half million dollars.

Subsequent to the closing through the corporate structure of LBHI there was invested over $388 million before the Chapter 11 filings and over $59 million after the Chapter 11 filings of which LBHI recovered about $28 million for a net postpetition outlay of 31.6.

This claim objection, pursuant to the Court's claim procedures order, is a sufficiency hearing, so we are going to analyze this on the same standards as a motion to dismiss.

So what is for the Court to consider in this context pursuant to Rule 10(c) of the Federal Rules of Civil Procedure adopted by Bankruptcy Rule 7010 the Court can

consider a copy of any written instrument which is an exhibit to a pleading and it's considered as part of the pleading for all purposes.

If we consider the proof of claim as the complaint and the reply, the original opposition to the minority shareholders as I think they elude to in their papers as supplementing the proof of claim, we can and the Court can consider the various exhibits filed to the minority shareholders' opposition.

Moreover the claimants were obviously aware of the Canadian proceedings as they say in their papers and there are additional exhibits which were attached to LBHI's reply with respect to the Canadian proceedings, and under Second Circuit authority, since claimants either had knowledge of those or obviously they were in their possession, we submit that the Court can also consider the four additional exhibits that are in the -- LBHI's reply as part of the record for considering this in the context of a motion to dismiss.

Reviewing those exhibits as a predicate for coming to this Exhibit A, which is also Exhibit 1 to the opposition, is a letter of intent. That is a letter of intent that was executed by Lehman Brothers Inc. or LBI.

Exhibit B or Exhibit 2 dated June 11, 2007 as well is what is being referred to in the papers as the Goodman

Steps (ph) memo. That was a memorandum prepared by Canadian counsel preclosing to describe the transaction between Lehman Brothers Inc., which was defined through that document as Lehman, for acquisition of indirectly through LB SkyPower Inc. of the interest in SkyPower Corp. Neither the letter of intent nor the Goodman Steps memo contain any reference to LBHI as to whom the claim is being asserted.

Exhibit C or Exhibit 3 is the stock purchase agreement. That agreement is between LB SkyPower, SkyPower Corp., and the minority shareholders. Again, LBHI is not a party or referenced in that agreement.

Exhibit D or exhibit 4 is a unanimous shareholders' agreement also dated June 11, 2007. Again, LBHI is not a party to that document.

Exhibit E referred to in the papers as a September memo dated September 5, 2007 after closing. There's also a memorandum from LBI, Lehman Brothers Inc. to the SkyPower board of directors discussing anticipated equity contributions and also a reference to LBHI as having been -- having given a guarantee with respect to a specific -- what's referenced as a frame agreement.

Exhibit F, that is the equity contribution agreement. LBHI is a party to that agreement. The other parties are SkyPower Corp. and HSM Nordbank, which was the collateral agent for a group of lenders with respect to a

transaction involving the acquisition of certain wind turbines.

THE COURT: So if any -- if anywhere there were going to be a mention -- a specific mention of a third-party beneficiary this would have been a good place, right?

MR. YOUNGMAN: That would have been a place -- the place, probably the better way to say it. It would have been in there.

THE COURT: But it's not.

MR. YOUNGMAN: No. The original equity contribution agreement was entered into December 28, 2007, that was in connection with a prior credit agreement. What is referred to in the papers is the amended and restated equity contribution agreement dated February 22.

Again, the minority shareholders are not a party to that agreement, there's nothing on the face of that agreement that indicates any intent to give third-party beneficiary status to any party, and in fact that agreement contains a specific provision giving enforcement rights or third-party status to the bank lenders. That is in Section 10.01 of the equity contribution agreement.

To set the framework for further discussion this Court has recently addressed a similar third-party beneficiary argument. That was in the Court's memorandum decision on the four hundred and eighty-eighth omnibus

objection that was dated June 18, 2014 and found at ECF 44782.

The minority shareholders are arguing here that they have direct claims against LBHI as a result of -- they call it a multifaceted transaction and is in effect trying to construe all the documents together to create a right. What they have identified to try to get there is the letter of intent, the Goodman Steps memo, the stock purchase agreement, and the shareholders' agreement.

Going to the Court's guidance from the June 18th memorandum opinion New York law requires that a party's intent to benefit a third party be shown on the face of the agreement or in the four corners of the agreement.

Secondly, if a contract contains an integration clause and there's no provision specifically conferring any benefit on a party claiming third-party beneficiary status it does not evidence an intent to create none where it is not stated.

And the Court went on to cite cases holding that a deafening silence, quotes, demonstrates there's a lack of intent to confer benefits.

As an initial matter the letter of intent and the Goodman Steps memorandum are irrelevant to any of the Court's analysis to whether there's a third-party beneficiary intent implied in any of these agreements.

Both the stock purchase agreement and the shareholders' agreements have integration clauses, specifically providing not only is it a standard integration clause, but each goes on to provide that the letter of intent specifically is not included or should not be considered in any analysis. That is found at the stock purchase agreement at Section 15.02 and the shareholders' agreement at Section 11.7.

The equity contribution agreement originally entered into in December of 2007, over six months after the stock purchase agreement, was entered into in connection with SkyPower Corp.'s credit agreement with various lenders with respect to specific transactions.

The only parties to the equity contribution agreement are SkyPower Corp., LBHI, Lehman brothers holdings Inc., and HSM Nordbank as collateral agent for the various bank lenders. There's no mention, there's nothing within the four corners of that document of the minority shareholders having any rights under the equity contribution agreement.

As to any reference to the rights of third parties to enforce that agreement that is found in Section 10.01 and lends only to the secured parties, and that is the lenders under SkyPower Corp.'s credit agreement.

There's no mention of the minority shareholders as

having any rights under the equity contribution agreement, there's no reference to the shareholders' agreement or the stock purchase agreement within the equity contribution agreement, and the equity contribution agreement is, to borrow the Court's words, deafeningly silent with respect to any intent to benefit the minority shareholders.

The hook that the minority shareholders are trying to rely on to establish a third-party beneficiary status under the equity contribution agreement is their statement that this was a "multifaceted" transaction that closed on June 11, and the equity contribution agreement amplifies the nexus between all these agreements. That tie does not work.

As noted both the stock purchase agreement and the shareholder agreement contain integration clauses and the only cognizable legal rights of the minority shareholders can only come from the four corners of the documents.

The minority shareholders do try to make an argument that affiliates of SkyPower Corp., which would run the chain to LBHI, are by the terms of the shareholders -- of the stockholders' agreement liable contractually.

As we've noted in our papers their use of the word "affiliate" as trying to establish liability under that document is simply misplaced. And also misplaced is just referring to an amorphous obligation of Lehman by trying to scrunch all of the companies together to establish liability

is also misplaced.

As we put in our reply we have laid out the specific contractual provisions of the stockholders' agreement where liability is established for what has been defined as Lehman in that agreement.

For example, Section 6.2(c) of the stockholders' agreement, it reads, "Lehman may at any time elect to reinvest all or part of the proceeds in the form of subscription."

Studying that document however Lehman used as a defined term in those provisions means LB SkyPower. It is specific, it does not mean any of the other Lehman overall entities.

There are similar provisions as we've cited in our papers under Section 8.1 as and when determined by Lehman to be necessary to fund expenditures, but there is no hook by these contractual provisions and to LBHI. Again, Lehman specifically defined to mean LB SkyPower.

And there's another section reference 8.2 that they rely upon, Lehman will as appropriate either provide reasonable assistance or use commercial efforts to provide a keep well guarantee or other credit enhancement. Again, Lehman reading the documents as LB SkyPower.

Affiliate is used in the shareholders' agreement and the specific term -- defined term affiliate is used but

not in a way that creates any liability, and we have referenced those at -- in our papers citing to Section 8.4.

There are certain approval requirements if goods or services are going to be provided for by Lehman, which again with LB SkyPower or an affiliate.

There were additional rights found in Section 10.1(a) through (b) dealing with -- specifically with affiliates, the rights of Lehman or its affiliates to transfer or sell shares, notice requirements if shares are being sold to a Lehman affiliate, or a Lehman affiliate may act as an investment banker.

Again, those are specific contractual provisions, they do not establish any kind of liability for the obligations that are specifically imposed upon LB SkyPower.

And as we've cited in our papers it's well established under New York law if the parties to a multi-party contract define different rights and obligations of the parties you don't mix those together into one whole.

Your Honor, there's nothing on the face of the agreements, the operative agreements that establish any kind of intent to provide third-party beneficiary status from LBHI to the minority shareholders.

As we have cited in our cases where contractual obligations are specific they should be enforced as such and should not be implied to other parties.

THE COURT: But can I just stop you to ask a question conceptually though?

When you make a first stop at the issue of standing, in other words, that this has been dealt with already in the SkyPower settlement, right, that LB -- this is an LBHI claim and that it was dealt with, do I even get to the third-party beneficiary analysis? Or in other words is their argument basically, well, even if you find that some of the claims were derivative I should find that there may be others that they have as third-party beneficiaries?

MR. YOUNGMAN: Their argument is ignore standing because minority shareholders have direct claims. That's partly why I was going first with arguing to the Court that there are no direct claims.

THE COURT: Okay. But your argument also is don't ignore standing. In other words you're saying don't ignore standing, but even -- but there are no direct claims so it doesn't matter.

MR. YOUNGMAN: Exactly. And Your Honor has given me a segway to --

THE COURT: Okay.

MR. YOUNGMAN: -- with no direct claims the minority shareholders' remaining arguments necessarily fall.

THE COURT: Okay, I see. It was set up slightly differently in your papers, you've reordered things.

MR. YOUNGMAN: I was reordering to try to hit the --

THE COURT: Okay. Very good.

MR. YOUNGMAN: -- surreply.

THE COURT: Okay.

MR. YOUNGMAN: But you hit it exactly.

THE COURT: Okay.

MR. YOUNGMAN: With no direct claims all that is left, if any claims at all, are claims that are derivative of SkyPower Corp., and as we have set forth in the chronology of this transaction in our papers SkyPower Corp. did go into a Canadian insolvency proceeding and a receiver was appointed, PWC. PWC settled that claim.

THE COURT: Right.

MR. YOUNGMAN: And that settlement was approved by both the Canadian court as well as recognized the in the pending Chapter 15 proceedings in Delaware by the U.S. courts.

The SkyPower settlement I'm calling it that was approved by Canadian court and the Delaware courts specifically resolved the SkyPower claim and brought an end to the equity contribution agreement. As such there is no further claim to pursue under the equity contribution agreement.

And as we have noted to the Court and attached as

exhibits in our reply the minority shareholders were notified of these proceedings and --

THE COURT: Did not object.

MR. YOUNGMAN: -- did not object.

THE COURT: Nor did they object at the recognition hearing in Delaware.

MR. YOUNGMAN: Correct.

THE COURT: Okay.

MR. YOUNGMAN: Therefore we submit that the minority shareholders are barred from seeking to reopen these issues that have already been approved by the Canadian courts, and the Canadian court as well as the Delaware court also is taking into consideration if there were these claims there are substantial unpaid creditors in the Canadian proceedings, and if you're going to respect the priorities of distributions one -- one could suppose that giving the minority shareholders a claim for those same things would be the antithesis of honoring the priority structure --

THE COURT: Okay.

MR. YOUNGMAN: -- that the Canadian court approved.

As to the corporate veil piercing. Again, with no direct claims to pursue veil piercing belonged to the corporation SkyPower Corp. The minority shareholders' claims, if any, for that we submit are derivative of those

of SkyPower Corp. under both Canadian law and U.S. law --

THE COURT: Well in any event at least with respect to veil piercing as between LBHI and LBI Judge Peck has rather definitively dealt with that issue I would say.

MR. YOUNGMAN: Yes.

In sum, Your Honor, there is no direct claim, it's not evident from the face of any of the documents. LB SkyPower was not a guarantor of the minority shareholders' investment. They were like any other shareholder in a corporation, the fates of the corporation dictates to some extent their fate as well. You cannot simply create liability where none exists by just saying Lehman in sort of a muddled up package and trying to create liability against LBHI.

THE COURT: Okay, thank you.

MR. YOUNGMAN: Thank you.

MR. BERGER: Good morning, Your Honor.

THE COURT: Good morning. How are you?

MR. BERGER: I am well. Thank you. Shaya Berger, and with me is Debbie Skakel from Dickstein Shapiro, and we represent what has been termed the minority shareholders, and I just wanted to notify the Court also that Mr. Kerry Adler (ph), who was also referenced in the papers, is also -- came from Canada here for this hearing --

THE COURT: Okay, welcome.

MR. BERGER: -- on behalf of the minority shareholders.

It's not surprising that the entire context of the transaction that lead eventually to the equity contribution agreement has been given very short attention, because if you just focus on the equity contribution agreement and you put your blinders on I can understand the presentation to the Court of why these claims don't exist or aren't derivative, but that can't be done, particularly that the claims being asserted depend on the intent of the parties, both whether it's the single transaction theory and both whether it's the third-party beneficiary theory, all go to the intent of the parties, and it's impossible to consider the intent of the parties when you just look at one agreement and not how that agreement came about.

THE COURT: But let me -- let me -- and I promise you I'll let you make your full argument, all right, but here's the problem, and I did just a couple weeks ago issue a decision rather on point, and the problem with this concept of intent and you know looking at the whole picture is that the law, as it's developed on third-party beneficiaries, recognizes that after the fact of course a wronged or disappointed party is going to come in and say but it was the intent that I was the third-party beneficiary and therefore the law developed to say that that intent

needs to be reflected on the face of the document. And lawyers actually know how to do that. You could do that right now if I handed you a piece of paper without breaking a sweat.

MR. BERGER: Uh-huh.

THE COURT: So I don't have any documents, putting aside your threshold statement, which I don't necessarily disagree with look at all the documents, but I do have to say notwithstanding the fact that they have integration clauses and all those other things that lawyers put in documents, but there's nothing. There is literally nothing other than what you're now telling me was or is the subjective intent.

So I'm going need something very powerful and specific from you to get me past that and to get me in essence to contradict what I just wrote three weeks ago in a context in which a third party was very much hurt by Lehman's conduct or things that happened to Lehman. So that's kind of the heavy lift that you have that you're facing.

MR. BERGER: Your Honor, it is my intent and hope that I do give a very powerful --

THE COURT: Okay.

MR. BERGER: -- argument and response, and I believe there is one.

THE COURT: Okay.

MR. BERGER: I also would just note that we did see Your Honor's opinion and we addressed it in our surreply.

THE COURT: Okay.

MR. BERGER: But before -- in order for me to adequately address it I think I do need to give the Court a context --

THE COURT: Go ahead.

MR. BERGER: -- and it's in our papers but I think it's very important so I promise to be short.

THE COURT: Doesn't -- you don't have to promise that.

MR. BERGER: Oh, okay.

THE COURT: Take as much time as you'd like.

MR. BERGER: Okay. Thank you, Your Honor.

So what we have here are -- is -- or is a company called SkyPower, and SkyPower was owned by a group of shareholders at one point in time and that was in 2007, and Lehman, through the letter of intent through Lehman Brothers Inc., but with and on behalf of Lehman Brothers Inc. and its affiliates, approached these minority shareholders and offered to buy the company. And the way they structured this transaction was that they would first initially buy a controlling interest, a minimal -- or at the very minimum

controlling interest of approximately 51 percent of SkyPower, but in a -- and pay cash for that, but in addition to that they agree that they would provide ongoing funding, because in order for the company to not only retain its value but to grow that funding was vital.

So SkyPower -- so excuse me -- so Lehman's structured this transaction to initially buy minority interest, continue to purchase and acquire additional interest -- continue to acquire more interest from the minority shareholders through equity funding to SkyPower.

And it is true under these agreements the company that it was obligated to perform these acts or these obligations to the minority shareholders was an entity called LB SkyPower, which was an entity specifically created to perform under these transaction documents, to acquire the majority interest and to be the funding source.

And what's not disputed at all is that number one, this concept that there be ongoing funding was a concept that all the parties intended to be there from day one. So this is not something that the minority shareholders are looking back at and saying, oh, why don't we wedge our way into these agreements or into this particular agreement, this is something from day one before the equity contribution agreement was actually entered into.

THE COURT: Sure, but the obligation are to

continue to put in funding. Again, that's an obligation to the -- the distinction we have to get is to the entity versus an obligation undertaking to the individual shareholders, right?

MR. BERGER: That is correct.

THE COURT: Right?

MR. BERGER: Yes, Your Honor.

So -- but this initial obligation that we're -- and you know, this initial obligation that we're talking about or that was initially contemplated was a promise or contractual obligation that went directly to the minority shareholders.

THE COURT: Where does that -- where is that?

MR. BERGER: That is in the shareholder agreement.

THE COURT: Okay.

MR. BERGER: In Section 6.02.

THE COURT: So that would be exhibit?

MR. BERGER: Exhibit 4. No, I'm sorry. Sorry, 6.1 of the --

THE COURT: Let me -- let me get there. I am in -- I'm looking at the exhibits that are attached to your opposition, right?

MR. BERGER: Yes, correct.

THE COURT: Okay.

MR. BERGER: Exhibit 4.

THE COURT: All right.

MR. BERGER: Section 6.1.

THE COURT: Okay. Give me a moment to get there.

MR. BERGER: Sure.

THE COURT: The -- not the -- the -- your exhibits are lettered. Am I in the wrong place?

MR. BERGER: No, our exhibits are numbered. No. 4 to the opposition, which I think is the same as Exhibit D to the plan administrator's reply.

THE COURT: Give me a moment, I'm suffering from a lack of tabs.

(Pause)

MS. SKAKEL: Your Honor, do you want to borrow my tabbed version of this document?

THE COURT: I think I'm getting bailed out over here.

MS. SKAKEL: Okay.

THE COURT: Okay. So it's 6.?

MR. BERGER: Section 6.1 and then Section 8.1.

THE COURT: And what am I looking at in Section 6.1?

MR. BERGER: So in Section 6.1 I'll read it into the record.

THE COURT: Okay.

MR. BERGER: "Lehman shall have the exclusive

right to make all equity investments in the corporation after the initial closing of the acquisition."

THE COURT: Right.

MR. BERGER: "After the initial pre-money valuation." And then it says -- it has certain expectations which do not apply here. And then it says:

"All equity investments by Lehman shall take the form of subscriptions of Class A shares at a price reflected by the initial pre-money valuation or in convertible preferred shares as contemplated by the third defined paragraph of section 7.1 by exercising their rights."

And what this is basically saying is that Lehman is the exclusive party that has the right to invest equity into this company and the way they're going to invest equity is that they will continue to purchase additional shares of SkyPower.

THE COURT: Okay. But you stopped short of the punch line. I thought you were going to show me something that then said that and this undertaking is for the benefit of the shareholders. This is for the corporation. It says the corporation.

MR. BERGER: Well by its terms -- by the term of this agreement and by the terms of this provision what is happening here is there's an acquisition of additional shares from the minority shareholders, that's what the

rights are and that's a defined term and that's what it's referring to. That all equity investments by Lehman shall take the form of subscriptions for Class A shares.

So the equity investment -- the purpose of the equity investment is not only to fund the company but to then buy additional shares from the minority shareholders.

And number two, the minority shareholders are parties to this agreement.

So by -- (a) by virtue of the fact that the equity contributions would be going to purchase to exercise the rights to purchase shares from the minority shareholders' agreement from the minority shareholders that makes this a contractual obligation that runs directly to the minority shareholders. It may also run to the company, but it's also a promise that runs directly to the minority shareholders. And in fact the minority --

THE COURT: So --

MR. BERGER: Sure.

THE COURT: -- just let me -- just let me stick with you here for a membership.

So Article IV -- and titles don't count of course -- but we're in something that's called "Exclusive Lehman right to invest," right?

MR. BERGER: Uh-huh.

THE COURT: So the whole tenor of this paragraph

actually is Lehman's exclusive right as opposed to Lehman's obligation, right? Where is the description of Lehman's obligation?

MR. BERGER: So that's in Section 8.1.

THE COURT: Okay.

MR. BERGER: And that's in Article VIII, referred to as Lehman's support and third-party project equity.

THE COURT: Okay.

MR. BERGER: And that's titled, "The rights" -- subtitled the rights:

"As and when determined by Lehman to be necessary to fund expenditures contemplated by an approved annual operating budget for the operating plan Lehman will exercise the rights."

And again tying into that section 6.1 Lehman will, so that's the obligation to exercise the rights to buy the additional shares from the minority shareholders and the form that that purchase would take would be VI equity funding and for SkyPower.

THE COURT: Okay. Okay, in the sense that I'm hearing you.

MR. BERGER: Okay, understood.

And again -- and it's important to remember the context of how this transaction took place in that the minority shareholders had full control of SkyPower at the

time and they were entering into an agreement with Lehman that was basically handing over the reigns giving them control of the company. And part of the consideration that's being given for that is that Lehman is promising them that we'll buy the rest of your shares too by providing equity to SkyPower, and in that sense that's what makes this contractual obligation direct to the minority shareholders.

THE COURT: It would have been better through for it there at the end for there to be a provision that's entitled third-party beneficiary and that says that the minority shareholders are the third-party beneficiaries.

MR. BERGER: In the equity contribution agreement, that's what Your Honor is referring to?

THE COURT: Anywhere.

MR. BERGER: Well --

THE COURT: There isn't one --

MR. BERGER: Well --

THE COURT: I mean you're telling me that this unanimous shareholder agreement I should take this as either one of the documents or the document that establishes the -- the separate right, and again, there's -- it's a reading between the lines exercise as opposed to a specific all lawyers know how to say it these are the folks who are the third-party beneficiaries of this agreement. There isn't that, right?

MR. BERGER: Well, I'll admit that corporate lawyers have always confused me, but that being said --

THE COURT: Me too.

MR. BERGER: Okay. So we're on the same page with that. And whether it would have been better or not been better I don't think is the question at this hearing.

The question is whether this provision, which is titled rights, and by its terms that means buying something from the minority shareholders, whether that creates an obligation directly to the minority shareholders, and I believe that that's what this accomplishes.

THE COURT: Well you could also say though that the obligation to contribute the equity ran to the company and that the means for implementation of that was going to be through the purchases of the shares.

MR. BERGER: You could say that, but that doesn't change the fact --

THE COURT: Well where would the -- if the equity contribution had gone in where would -- where would the money -- the money would have gone into the company, right?

MR. BERGER: The money would have gone into the company and then by continuing to own shares in the company down the line there would have been (a), dividends potentially --

THE COURT: Right. But it wasn't a transaction

here's the money you give me your shares.

MR. BERGER: No.

THE COURT: It was an equity contribution into the company, right?

MR. BERGER: But the fact that the minority shareholders chose that that's the way that they would receive their compensation for their relinquishment of rights should not change -- should not matter. If that's the way that they chose the payment to happen then that's the way they chose it and that doesn't change a direct contractual obligation into an indirect contractual obligation.

THE COURT: Okay. Okay. Why don't I let you keep going.

MR. BERGER: Okay. And as has been mentioned there is this Goodman Steps memo which lays out -- it's basically a game plan of -- or a Steps plan --

THE COURT: Okay. So let's --

MR. BERGER: -- of how --

THE COURT: -- let's look at the Steps memo.

MR. BERGER: Okay.

THE COURT: If I can find it.

MR. BERGER: I believe that's Exhibit 2 to our -- to the minority shareholders' opposition. Or Exhibit B to the plan administrator's reply.

THE COURT: B or D?

MR. BERGER: B. I'm sorry.

THE COURT: Okay.

MR. BERGER: And I'm on page 5 and it's number 21. Future equity comes -- I'll wait for Your Honor.

THE COURT: Okay.

MR. BERGER: Future -- and this is in the -- in the section called post-closing transactions.

"Future equity contributions by Lehman will be made -- sorry -- will be made in consideration for additional class A common shares of Acquisition Co." Acquisition Co. would be the ultimate that holds all the shares --

THE COURT: Right.

MR. BERGER: -- to which both Lehman and the minority shareholders will own the shares of Acquisition Co. pursuant to the rights.

THE COURT: Right.

MR. BERGER: So again we have a clear contemplation by the parties that there's going to be future equity contributions by Lehman.

THE COURT: Okay. We all agree on that.

MR. BERGER: We all agree --

THE COURT: However, now in this step if I were with you on your theory then this step would have said

future equity contributions by Lehman will be made in exchange for -- to the Class A shareholders in exchange for the tender of their shares. And it doesn't say that.

MR. BERGER: Perhaps if I was writing -- if I was -- asked for me to I didn't it maybe that's how I would write it, maybe not, but the fact is it says will be made in consideration for additional Class A common shares. Well who owns those Class A common shares and who's providing that consideration? It's the minority shareholders.

So even if it's not written perfectly like that but by its very terms what this means is that Lehman is making equity contributions in consideration for the minority shareholders to give up their -- some of their minority shares.

And I think here it's important to pause and just think about what is happening here in that Lehman here as the plan administrator --

THE COURT: But see you're recharacterizing this as a deal in which Lehman was buying the shares of individuals, and that's -- it's an equity contribution, it's not a share purchase program. I mean you -- in order for me to go with you down this path I have to recharacterize, rethink the whole transaction as an obligation of Lehman specifically to buy the shares of these folks.

MR. BERGER: Well, first of all I would get to the

-- which one is Lehman in a second.

THE COURT: Okay.

MR. BERGER: I just want to address that.

But to address Your Honor's question, if there was -- the Goodman's memory was just number 21 or if there was just an equity contribution agreement I would agree with Your Honor, but the way Your Honor characterized it as not being that's exactly what it is.

The -- Lehman wasn't coming to SkyPower and saying I want to fund you, Lehman was coming to the owners of SkyPower and saying I want to buy your company and this is how I'm going to buy your company, and part of the compensation of me buying your company in the future for future shares is going to be I'm not going to give you the cash but I'm first going to give the cash to the company. That's -- it is exactly in this context because that's what we're talking about here.

Certainly at this stage in the game in June 2007 we're only talking about a share purchase agreement and yet we're contemplating --

THE COURT: But there's such a big difference between agreeing to infuse equity into a company, for example, and making a tender for shares, going out to somebody and saying you have those shares, sell me your shares. There's a huge difference between that, and you are

-- we're mushing to use the technical legal term.

MR. BERGER: Well -- well both of these is -- both of those points or both of those ways of purchasing is exactly what happened, there were two components to it. There's one component I'm going buy your shares and a second -- with cash right now, and then there's the second component I agree on buying them myself, I'm going to continue to buy your shares but that cash -- the way we're going to structure that part of it is going to be by infusing equity into the company. But that's not an independent and it should not be separated from the agreement that there -- that these contents are both contained in, which is the stock purchase agreement, and it's coming -- you're coming from the perspective of -- again, not of Lehman coming I want to infuse equity into your company, I want to work that particular arrangement, but rather I want to buy your company and this is how we're going to do it and this is one part of how we will do it.

And I'm not the one that's mushing it together, it's the parties that mushed it together. And again, I'll just -- I know I'm repeating myself -- but the minority shareholders should not be punished or their claim doesn't magically turn into an indirect claim because that's the way they agreed to structure that part of the deal.

And one thing --

THE COURT: But the minority shareholders didn't object to the SkyPower settlement in the Canadian proceeding.

MR. BERGER: Correct.

THE COURT: Why was that?

MR. BERGER: Well, I'll put aside whatever notice issues and whether there was proper issue.

THE COURT: Uh-huh.

MR. BERGER: But the fact of the matter is the minority shareholders alleged -- or asserted direct claims in this Bankruptcy Court and there was a pending objection in the Bankruptcy Court. The fact that SkyPower also filed its own claim and that claim was being settled. I mean if someone would have invited us to the party maybe to share in that settlement no doubt we would have at least listened. But that was a separate issue, it's a separate claim, it's SkyPower's own claim. Granted it might relate to the same facts, but the minority shareholders' claim was their own claim and that's one of the cases that the plan administrator himself actually cites and we then cite it back in our surreply, it's the (indiscernible - 01:27:19) case would have these exact facts where there is two separate claims. There was claims -- direct claims by the shareholders and then there was claims by the debtor in a Bankruptcy Court, that was actually a U.S. Bankruptcy Court.

THE COURT: Uh-huh.

MR. BERGER: And the court specifically said -- it happens to be their -- the shareholder did object -- but his objection was overruled and the court said what I'm settling here today, the debtor's claim, that's -- you're still going to have to deal with the shareholder on his individual claim.

And there was -- and I'll just mention in terms of equity, to have our claim pending for three years in the middle of those three years sneaking off to another jurisdiction to resolve our claim it just doesn't -- that doesn't seem fair to me at all, number one.

And number two, obviously --

THE COURT: I don't think you could say they exactly sneaked off to Canada.

MR. BERGER: Well, okay, I won't say -- you're right, not sneak off.

THE COURT: With PWC and the Canadian court. They're not really known as sneaky types --

MR. BERGER: Correct.

THE COURT: -- you know.

MR. BERGER: I was getting a little excited, no doubt about that.

But the bottom line is if there's a pending objection in this court which has the jurisdiction to -- to

resolve claims against Lehman it should --

THE COURT: Okay.

MR. BERGER: And again, and one final point.

THE COURT: All right.

MR. BERGER: There's nothing in the settlement agreement that bars direct claims --

THE COURT: Okay. So can we --

MR. BERGER: -- so it's really much to do about nothing.

THE COURT: -- can we go to -- we've been in a lot of the ancillary documents, so now can we go to the equity contribution agreement which --

MR. BERGER: Yes, absolutely.

THE COURT: -- is the biggy, right? That's the big one.

MR. BERGER: That's the big one.

THE COURT: Okay.

MR. BERGER: And then there's this point I want to make. The funding obligations that we've been talking about (indiscernible - 01:28:44) are LB SkyPower, and the company that increased its ownership in SkyPower was LB SkyPower, and yet there's no dispute that the company that actually funded those equity contributions was LBHI.

So we have this question facing us. On the one hand in the shareholder agreement there's this right --

there's this rights to purchase new shares by way of equity infusions and LB SkyPower does in fact exercise those rights and quote/unquote miraculously increases its equity contributions without paying a penny, and yet it's LBHI that's actually making all the funding, and that's something that is not disputed.

So I think in that context -- now we can in fact turn to the equity contribution agreement.

THE COURT: Okay.

MR. BERGER: And there's been -- and because there's been a point raised regarding the timing I guess before we go to that if I could just turn to -- let's see -- it's Exhibit 6 to the opposition, which I believe is Exhibit F --

THE COURT: Right.

MR. BERGER: -- to the reply. And that is the Lehman Brothers' memorandum. And this is a memo dated already September 2007, and it's not -- it's actually not written entirely clear in --

THE COURT: I'm sorry, I thought we were in the equity contribution agreement.

MR. BERGER: Yes, but -- I'm sorry -- just before I got to that because --

THE COURT: Yeah.

MR. BERGER: -- a point has been raised regarding

the timing of the date of --

THE COURT: Oh, okay.

MR. BERGER: -- the equity contribution agreement, I'm just pointing to this memo, which is September 5th, 2007, which is three -- less than three months after the shareholder agreement, and in it it's already -- it's already referencing equity contributions that have been made. In fact on page 1 on the third line it says, "As of the date of this memorandum U.S. $19 million cash was invested by Lehman Brothers into SkyPower." And the line above that just to be clear says:

"All actual and deemed equity investments by Lehman shall take the form for -- of subscriptions for Class A shares at a price reflective of the initial pre-money valuation."

THE COURT: So at the time that this occurred, right, were the Class A shares all issued and outstanding?

MR. BERGER: They were all issued and outstanding, but during this time the ownership of those Class A shares shifted, vis-à-vis, the equity contributions that were being made at the time.

THE COURT: What do you mean by that?

MR. BERGER: Meaning that the equity contribution was not a stand-alone equity contribution in that here's your money, it's here's your equity contribution please give

me your Class A shares.

So there were equity contributions during this time, and during that time in exchange for those equity contributions the minority shareholders had to relinquish some of their Class A shares.

THE COURT: So what was the -- I mean how -- what was the mechanic, right? I mean how did it -- literally how did it work? I mean -- and you know, I'm making you be a corporate lawyer now, right, you're in -- like the money comes in, they've got those things with all the papers standing up, like literally how did it -- how did it work? Because on the face of this, you know, there's nothing that doesn't indicate that, you know, the shares would be issued.

MR. BERGER: Well --

THE COURT: Again, what -- I sound like a little bit of a broken record, but -- but this is because everywhere it says equity investment you want me to read that as saying share purchase.

MR. BERGER: Right, and I do that because of the terms of the shareholder agreement and I do that because of the way it's written, an equity investment shall take the form of subscriptions for Class A shares, and I'll just point to the next paragraph which says -- which references the prior --

THE COURT: Right. But it says -- again, I'm

going to take this back against you, "The form of subscriptions for Class A shares." In other words I make the equity contribution, right, and in return you company better give me some Class A shares. It doesn't say where they're going to come from, right?

MR. BERGER: Correct, Your Honor.

THE COURT: I mean the company could issue them, the company could --

MR. BERGER: Correct, Your Honor. But number one, if you look back -- again, this is a memo which yes we are relying on -- but the operative documents by which this transaction referenced in the memo took place is the shareholder agreement which clearly tie the equity contribution to the rights, i.e., the rights to buy more shares from the minority shareholders. Point number one.

Point number two, if you look at the next paragraph which says, "As of this date $19 million in cash was invested by Lehman Brothers." And then the last sentence says, "(indiscernible - 01:33:38) has been computed on this amount." And I believe that reflects the exact structure that I've been talking about, which is the minority holders' shares have been diluted as a result of the $19 million invested by Lehman to that date.

THE COURT: Okay. But now finally let's go into the --

MR. BERGER: Uh-huh.

THE COURT: -- amended and restated equity contribution agreement, because again, you go back to it's got an entire agreement clause, right, which specifically says:

"This agreement supersedes all prior agreements understandings, negotiations, and discussions whether oral or written of the parties relating to the subject matter hereof and entered into prior to the date of this agreement."

Bam, right, the biggy.

And then the very next section it says, "Equity contributions. The sponsor agrees to make one or more cash equity contributions to the borrower." It's kind of problematic.

MR. BERGER: Yes, Your Honor, I will address this issue.

THE COURT: Okay.

MR. BERGER: First of all the question is the intent of the parties, and there's no doubt that an integration clause may reflect or may be used to reflect intent of the parties, but there's no case law that says if there's an integration clause you're done.

In the -- in the context of the agreement with an integration clause it certainly adds to that. That's my

first point.

And to that although it was in the context of our other argument, which is that all the transaction documents should be read together, I would also point to the second Circuit case, And This Is Me -- And This Is Me, the one agreement that had --

THE COURT: Great case name, you have to admit, right?

MR. BERGER: It's a great case. I would have loved to have been the lawyer in that case or maybe not, I don't know.

But in any event the one agreement that actually had the guaranteed $750,000 payment specifically had an integration clause.

But again, given the circumstances of everything that -- of the various agreements that are involved and given the context of the transaction -- although under a different theory, not third-party beneficiary -- but under similar standard of the intent of the parties to effectuate a common purpose the court didn't let that integration clause block other defendants from being responsible for that guaranteed payment.

So I would also go -- go back for a second -- and I know we're talking about the equity contribution agreement, but it's important in this context. I'm sorry to

go back and forth.

In the unanimous shareholder agreement, which is Exhibit 4 or Exhibit D? No, I'm sorry, excuse me.

THE COURT: That's okay.

MR. BERGER: I actually want the stock purchase agreement, which is Exhibit 3 or Exhibit C. In Section 14.01, this contains defined terms, to be defined terms called operative agreements, and the definition goes:

"Operative agreements means this agreement, the employment agreements, the rights agreement, the shareholders' agreement, the amended acquisition (indiscernible - 01:36:59), and any other support or other agreement to be entered into in connection with the transaction. Each such agreement in the form agreed upon by the parties."

So that operative agreement number one clearly contemplates that this is part of a multiparty transaction. But number two specifically contemplates potential agreements of support to be entered into later on.

And then if you turn to Section 15.02, that's the integrational clause on the stock purchase agreements, when it says the entire agreement the agreement says, "This agreement and the operative agreements supersede all prior discussions and agreements." So that's the integration clause for the share purchase agreement.

And again contemplating that there's going to be future agreements and that's what should all be read together.

THE COURT: So let me -- let me ask you and maybe with can try to move this along a little bit. So this is a sufficiency hearing, 12(b)(6) standard, et cetera. If I were to agree to let you out of the starting gate ,so to speak, right, then we would go to a trial. And so if you try to envision what that trial would look like we have all these documents, right, and the proof, if you will, would be I would circumstantially piece together all of these statements and you would be asking me to find intent, and presumably you would also introduce testimony of intent.

MR. BERGER: Uh-huh. Yes.

THE COURT: And that's where I get into kind of a quandary, because then on the other side so I'm going have people come in and they're going to say that wasn't the intent, you know, if that had been the intent we would have put them in the document.

So I get back to where we started, which is that's why the reason the law has developed that the intent needs to be so clear from the face of the document because otherwise you're in this very subjective territory where of course one party is going to say this was the intent and this wasn't the intent.

And the other thing, you know, to get back to kind of a law school type question, the slippery slope argument, right? So if I agree with you that the minority shareholders were third-party beneficiaries, well maybe the employees of SkyPower were also third-party beneficiaries, because then, you know, the money was going to come in and there was going to be this company and they were going to have employment. So how do I stop -- how do I stop?

MR. BERGER: I think the answer to both questions is one answer, and that is you have very unique facts that make this claim different and make it obvious from the face of the agreement in considering it in the context of what's -- of the surrounding circumstances of what the intent of the parties was. And that is because on the one hand you have under the stock purchase agreement LB SkyPower obligations to exercise rights by making equity contributions.

Step two you have no equity contributions from LB SkyPower.

And then step three you have -- I'm sorry comma -- step three you have LB SkyPower increasing its shares because it's exercising its rights.

And then step four you have an equity contribution signed by LBHI making those very equity contributions that resulted in the exercise of those shares.

So what you have here is -- I don't have to search and come up with theories, for example, in the Newport case of how I would have benefited from this if Lehman would have done the right thing to the part of that agreement. That's not what with we have. We actually have a direct line and it's a simple connecting of the dots in that you had rights going directly to the minority shareholders that were performed -- that were obligated to be performed by one Lehman entity but instead were performed by LBHI under this other agreement and yet the result was the same in that other Lehman entity increased its share holdings. And to that that's where you get to if you look at the face of this document with the surrounding circumstances. You go, ah ha, I see this was intended to benefit the minority shareholders as a third-party beneficiary.

And, you know, we cited also it's out of the District of -- District Court in D.C., a Bank of New York case which made a point, you know, that you can look to outside -- and then again this in the context and they are very similar to the single transaction theory -- that said you can look to other agreements not only the transaction unanimous agreements. There they were looking to an offering memorandum, they were looking to attorney's letters, and they said, Bank of New York why -- if the other party was -- if the FDIC was saying look at the intent of

the parties why didn't you come back and say no, this is not the intent of the parties? And I agree at a sufficiency hearing we can -- we can come in and we can battle that out so to speak, but at this point in time we've certainly presented facts that when looked at as a whole and then when you look at that the equity contribution agreement was accomplishing and what it did accomplish it would lead to the result that the minority shareholders were the third-party beneficiaries.

And I believe this ties -- this is what makes both points a flip side of the same coin. I don't think there's a dispute as to the law. Everyone agrees that a direct claims means that there's a direct right or a direct relationship between a defendant or the debtor and a claimant or the plaintiff, call it debtor and claimant in this context, if there's a direct right that runs to the shareholder and whether that's a tort or whether that's a contract -- a contractual right and you reaching that was a harm that they suffered uniquely not -- and it might have also hurt the corporation, but it also harmed them, then you have a direct claim. And given our theories of how you have that direct contractual relationship that easily connects the dots to make this a direct claim.

THE COURT: Okay. And that addresses -- and therefore if I agree with you on that then the standing

issue becomes irrelevant.

MR. BERGER: Just goes away.

THE COURT: Okay.

MR. BERGER: I'm not sure, I can go to the alter ego quickly. I don't know if Your Honor has anymore questions on this.

THE COURT: No, why don't we give Lehman's counsel --

MR. BERGER: Can I just make one point on the alter ego?

THE COURT: Of course.

MR. BERGER: Under New York law there is a series of cases on alter ego that says if you create an entity specifically for a transaction you can't -- and then you use that entity to breach a contract or to inflict a tort that is an alter ego claim, and that's what makes -- I know Judge Peck's decision has been mentioned here. First of all that's between LBI and LBHI.

THE COURT: Right.

MR. BERGER: We're going straight from LB SkyPower to LBHI, but this context is different, this is not a derivative claim of LB SkyPower, this is actually a direct claim specific to minority shareholders in that LBHI created an entity specifically to enter into this transaction, used that entity to reach its obligations, and yet the whole time

was holdings itself out as we're the one that's really making this acquisition, and that's what makes this alter ego claim viable.

THE COURT: Okay.

MR. BERGER: Thank you, Your Honor.

THE COURT: Thank you very much. Okay.

MR. YOUNGMAN: Okay. Your Honor, I don't remember the case but I think it's fairly black letter law that the intent of the parties is to be gleaned from the four corners of the documents.

Also black letter law is that corporate structure and separateness have legal effects and transaction documents have legal effects.

As you said those have developed over the years to avoid the he said, she said arguments that go perpetually nowhere in court. So people know how to draft documents and these documents were carefully drafted.

Now in response to counsel's arguments on the shareholders' agreement. Again one cannot just say Lehman and use that to appreciate the legal effect of these documents. For example, the shareholders' agreement, the sections that were cited by counsel 6.1 and 8.1 use the defined term Lehman as setting up those obligations. On page 1 of the shareholders' agreement Lehman is defined as LB SkyPower. That is the party with legal rights and

obligations under that document.

THE COURT: So wait, so where you're going with this is that if I agree with Mr. Berger about the existence of the rights of the minority shareholders that we then hit the speed bump of the fact that Lehman is not LBHI it's Lehman SkyPower.

MR. YOUNGMAN: Exactly.

THE COURT: Okay.

MR. YOUNGMAN: Again, corporate structure and separateness have legal ramifications and this is LB SkyPower's rights and obligations.

The stock purchase agreement is the same. Again, Lehman in that context is LB SkyPower.

Let's turn to the equity contribution agreement. As an initial matter the equity contribution agreement is structured for a specific transaction, that is LBHI who is definitely a party to that agreement, will make contributions to cover any shortfalls that may be owing under the bank credit agreement.

Let's accept for just a moment -- I'm disputing it -- but let's accept for a moment that these equity contributions were somehow meant to be a direct purchase of the minority shareholder stock.

THE COURT: Right.

MR. YOUNGMAN: That's not how the transaction was

structured. As the September 5 memo, which by the way was a memo from Lehman Brothers Inc., LBI, again, staying away from this overall Lehman concept, noted that these equity contributions would be dilutive to the minority shareholders.

Let's say you and I have a company. You have $10 --

THE COURT: Okay.

MR. YOUNGMAN: -- of stock, I have $10 of stock. We each have stock worth $10. I'm going to put in another 10 so now I have $20 of stock, you have 10.

THE COURT: Right.

MR. YOUNGMAN: I have two-thirds, one-third --

THE COURT: Right.

MR. YOUNGMAN: -- instead of one-half, one-half, you still have $10 of stock, you know, assuming relative values.

THE COURT: Right.

MR. YOUNGMAN: It was diluted, there was no transaction that was saying I'm going buy your $5 of your 10 to maintain that -- or to develop that dilution.

Again, the intent of the parties is to be gleaned from the four corners of the documents. There is nothing within those documents that evidence any intent that LBHI, the debtor, and it gets to when the claim was made had any

obligation or intended to create any obligation from LBHI to the minority shareholders. In essence is they're arguing to guarantee the value of their investment.

THE COURT: Okay.

MR. YOUNGMAN: As I said their fortunes rose and fell with the fortunes of SkyPower Corp. and any claims for the fall part of that is derivative of their interest in SkyPower Corp.

As to the stock purchase agreement and the definition of operative agreements, I guess a transactional lawyer would read that as the agreements in existence at that time. Let's assume that it was contemplating any document that was going to be executed in the future. As the Court noted the equity contribution agreement does have an integration clause in and of itself which would belie any intent that is not expressed in the equity contribution agreement that would purport around from LBHI to minority shareholders if you could craft that all of the stock purchase agreement.

Nothing further, Your Honor.

THE COURT: Okay. Very good. All right, thank you both very much.

MR. BERGER: May I just make one more point?

THE COURT: Yes.

MR. BERGER: Thank you. Actually two more points.

Point number one is the -- I don't think it's a corporate lawyer, I think it's just the way the agreement is written it says -- and this is going to the defined terms of operative agreements -- it's and agreements to be entered.

But point number two I just would like to cite in the Second Circuit case that was cited and relied on by the plan administrator, it's Central Hudson Gas & Electric versus Empresa Naviera, it's 56 F.3d 359 and it's a Second Circuit case, the jump cite is 371 and this is what the court said.

"In other words, Empresa was a third-party beneficiary only if it establishes a right to performance under the agreement and if the surrounding circumstances indicate that Central Hudson intended to provide Empresa with the benefit of such performance."

So there's certainly second -- there's other precedent, but certainly this case is Second Circuit precedent that under New York law you look at the surrounding circumstances. And in that context -- and I know this is a point we already made -- but why was Lehman agreeing -- why was LBHI agreeing to enter into the equity contribution agreement? Was it some -- and why did it provide funding before actually signing it? Was it some out of the goodness of their heart or was it actually connected to something they had already agreed to? And that's our

position, that it's something that they had already agreed to.

THE COURT: All right. Well, I don't disagree with you. I mean far be it for me to disagree with the Second Circuit, but I've also written recently in another case where of course you have to look at contractual language in context. I mean if you didn't then, you know, I would be out of a job because you would just have a machine, you know, reading the words --

MR. BERGER: Right.

THE COURT: -- of the contract.

So I don't disagree with you that you have to look at the surrounding circumstances and the context, but first and foremost you have to look at the words in the document.

So you've given us a lot to think about --

MR. BERGER: Thank you, Your Honor.

THE COURT: -- and I appreciate your thoughtful arguments, and we will take this under submission and get back to you in due course. All right?

MR. YOUNGMAN: Thank you, Your Honor.

MR. BERGER: Thank you, Your Honor.

THE COURT: Thank you very much.

Okay. Next we have the Conway Hospital matter. It's still good morning.

MR. HORWITZ: I was checking my watch to make

sure.

THE COURT: Checking your watch to be sure?

MR. HORWITZ: So good morning, Your Honor.

THE COURT: Do we have someone else here? Yes.

MR. HORWITZ: Yes. Okay. Maurice Horwitz, Weil, Gotshal & Manges on behalf of the plan administrator.

So the last item on the agenda for this morning is one claim on the three hundred and twenty-third omnibus objection to claims which was filed on July 9th, 2012. It's ECF number --

THE COURT: Right.

MR. HORWITZ: -- 29295.

The objection requests that the Court expunge certain claims because they were filed after the applicable bar date in these cases.

Today the plan administrator is proceeding with respect to proof of claim number 68076, which was filed against Lehman Brothers Special Financing Inc. or LBS Inc. by Conway Hospital, Inc. on April 18th, 2012, which is years after the September 22nd, 2009 bar date.

THE COURT: Right. Right.

MR. HORWITZ: The claim is based on a forward purchase agreement between LBSF and Conway dated June 8th, 1998. Conway has referred to this as a securities contract. LBSF does not dispute that it's a securities contract. LBSF

also views this as a swap. Conway may dispute that, but both parties agree that this is the type of contract that falls within the safe harbors and entitles Conway to terminate the contract --

THE COURT: Upon the filing, right?

MR. HORWITZ: -- because of a condition. I'm sorry?

THE COURT: Upon the filing.

MR. HORWITZ: Upon the filing --

THE COURT: Right.

MR. HORWITZ: -- upon LBSF's filing or because of -- because of LBSF's filing.

THE COURT: Right.

MR. HORWITZ: Conway did terminate this contract on November 21st, 2008, it sent a termination notice to LBSF, their termination notice states that it is being sent because of LBSF's filing on October 3rd, 2008.

THE COURT: But they say they did it wrong. They say we tried to terminate but we got it wrong --

MR. HORWITZ: They say it now.

THE COURT: -- and therefore it wasn't terminated.

MR. HORWITZ: Correct. Now they say that they did that wrong. They also did not file a proof of claim by the bar date which was set as September 22nd by this Court's July 2nd, 2009 order.

So they challenge -- they attempt to challenge their own termination now arguing that the contract is still executory at the effective date and that therefore they were filing within the 45-day deadline for contracts that were rejected on the effective date.

THE COURT: And then they say they're metavante.

MR. HORWITZ: They rely upon metavante in which their counterparty waited for a full year and still hadn't terminated, and so this Court -- Judge Peck held that that counter party had waived its right to terminate. LBSF has never asserted that Conway waived its right or that the termination was invalid.

Conway also tries to argue that the bar date order does not apply to -- specifically apply to terminated securities contracts. Conway characterizes the bar date order as applying to only four types of contracts, prepetition claims, guarantee claims, derivative contracts, and rejection claims.

The bar date order in fact in its second ordered paragraph states it applies to all prepetition claims. It's a very misspoken complicated bar date order and has special provisions for what it defines as derivatives contracts and for executory contracts and guarantee claims, but those special provisions just require -- at least for derivatives contracts and guarantee claims -- require claimants to

submit an additional information do not exempt any other parties from filing any prepetition claims that they may have as of that date.

Conway had, you know, at the -- because they had terminated before the bar date they had a claim they could have asserted, they didn't assert it by the bar date so the plan administrator filed its objection.

THE COURT: Okay. All right. Thank you.

Let me hear from Conway. Now it's good afternoon.

MR. WHITE: May it please the Court. I'm Andrew White. This is Tom Macauley. We represent Conway Hospital.

THE COURT: Very good. So you folks were not involved in 2008 or in 2009?

MR. WHITE: By not involved?

THE COURT: You, as counsel.

MR. WHITE: Oh, correct, Your Honor.

THE COURT: Okay. Then, I will say what I'm going to say with full bluntness. There are so many things that are troubling about this entire picture. Okay?

Number one, it would seem that somebody at Conway tried at the time when there was a lot of chaos -- and there were certainly a lot of counterparties who didn't exactly know what to do with this instrument they had in their files. Somebody sent a letter terminating it, and they sent it to the wrong place, but nobody at Lehman, Alvarez &

Marsal, Weil, Gotshal, anybody ever said this doesn't work, it didn't terminate. And there was no follow-up.

So, as far as to draw the analogy to kind of the metavante facts, it was terminated. It was terminated.

Then, the next thing that happens in the important timeline is the bar date notice. So everybody on the planet knew that Lehman was in bankruptcy.

The bar date order, as counsel indicated, was, in one sense, bespoke (sic), meaning had very specific provisions about types of information that needed to apply, but, like all bar date orders that any first-year associate would read, when there's a bar date order, the immediate reaction is, "Oh, my goodness, there is a bar date order. Let's put this date down in 16 different places. Let's tell every client we have that, if they conceivably, possibly have any claim remotely related to Lehman Brothers, we need to file it now."

And what you're suggesting now at this point is that now you're saying, "Oh, the bar date order didn't apply to us." What you're not saying, though, is that, at the time, somebody thoughtfully sat down, read the bar date order, did an analysis, and came to the conclusion erroneously that it didn't apply. You're not saying that, and I think the reason that you're not saying that is because it didn't happen.

Somebody missed it. They missed it, whether it was in-house counsel or predecessor counsel. They just missed it, and now, you've been tasked with helping your client -- and I understand that -- figure out a way to still lodge a claim, because it's a substantial claim.

So now we're kind of going back and saying oh, look, that bar date order, to which I don't even know the numbers, but I would suspect tens, if not hundreds of trillions of dollars of claims were filed somehow did not apply to this, and you dropped this very curious footnote on page six of your amended response that talks about 502(g). I frankly don't follow it at all in terms of 502(g)'s treatment of terminated contracts as general unsecured claims as opposed to administrative claims.

You know, once again, you know, a very basic is that, when a contract is terminated, groups' contract is terminated it gives rise to a prepetition claim. So then, somehow, when the confirmation came about, somebody had an oh, my goodness moment and then decided we have to come up with a theory on why we didn't file it before, and it just doesn't work.

So what you're asking is well, let's do an excusable neglect analysis. Let's go down the excusable neglect path, but, because there's an absence of kind of the scenario of somebody looked at the bar date order, somebody

looked at our contract and, you know, they were inexperienced, or the person who had to do that was out sick that day.

You then have the problem of dealing with the period of time between the bar date order and the confirmation hearing, where the Lehman case was still open and notoriously going on. And, if that had occurred, somebody would have filed a late claim and said, "Oh, my gosh, we messed up excusable neglect." So we have none of that. We have none of that, and we kind of have all of these after-the-fact revisionist history looks at the notice itself. You know, we made a mistake. Therefore, we waived our own rights.

I'm having a hard time with it, and it's not my favorite thing to do to tell a creditor that you're entirely out of luck. Believe me, it's not, but I have a responsibility to the creditor body at large to enforce the rules, you know, on an even and fair and consistent basis.

So, having said all of that, I'm happy to give you an opportunity to respond.

MR. WHITE: Thank you, Your Honor. I perceive perhaps an uphill battle.

No, but, Your Honor, you know, I'm not going to disagree with your overall view that somebody missed the ship, that somebody is looking for a reason why --

THE COURT: Yeah.

MR. WHITE: -- it should be allowed.

THE COURT: Right.

MR. WHITE: And let me explain to you, at least of the rational view, why, in fact, I think such a case exists.

THE COURT: Okay.

MR. WHITE: Okay? Lehman Brothers -- first of all, let me first say that the designation claim is a forward (sic) purchase agreement versus our guaranteed (sic) yield (sic) contract. We don't agree with that designation. It probably doesn't matter, but, just for purposes, we're not contending anything, other than it was a security structuring.

THE COURT: Well, it was designated as such on the proof of claim form that was sent, is that what you're saying?

MR. WHITE: The document itself doesn't mention forward (sic) agreement or anything like that. I'm only saying that to preserve our rights. We're not admitting that it's a forward agreement.

THE COURT: Okay, but --

MR. WHITE: That's --

THE COURT: But go back to -- so you would have received -- what document are you referring to? The --

MR. WHITE: Oh, I'm sorry, Your Honor. In our

amended response to the objection, we referred to the document as a guaranteed yield agreement. Lehman refers to it in its amended objection --

THE COURT: Oh, I see. Okay.

MR. WHITE: -- as a guaranteed yield contract. I'm just saying right now --

THE COURT: Okay.

MR. WHITE: I don't want to get into labels, because I don't think it has anything to do with anything now.

THE COURT: That's fine. Okay.

MR. WHITE: Okay. So here's where I'm coming from, Judge. We filed a proof of claim, obviously, and Lehman has the burden of proof of -- because it's objected -- to find a reason why the claim should not be allowed, and the reason is, you know, untimeliness of the bar date brief (sic). Well, if Lehman is going to figuratively hold up the bar date order as the reason why our claims shouldn't be allowed, it's incumbent upon Lehman to explain what in the bar date order bars our claim.

Now, that doesn't mean that we couldn't have done it better, or I should say we, because, as I said, I wasn't involved. I sure am glad I wasn't, Judge, after hearing from you, but the fact is Lehman has the burden of proof of showing why the claim is untimely, and, if they're going to

rely on the bar date order as the reason why the claim was untimely, then it has to be something in the bar date order that makes the claim untimely.

THE COURT: I agree.

MR. WHITE: Okay. Now, what is our claim? Okay. We do have one of those unusual contracts, unusual being in the sense that the ever-day executory contract, the non-debtor party has no right to cancel it. Only the debtor can reject it. All right?

THE COURT: Uh-huh.

MR. WHITE: So we do have one of those special situations under the code.

THE COURT: Safe harbors, right.

MR. WHITE: Safe harbors, exactly, where we can elect to terminate. Part of our argument was, Judge, I was going to say let's assume for the purposes of argument that, in fact, that doesn't apply. The contract was effectively terminated --

THE COURT: Okay.

MR. WHITE: -- in 2008, and, on top of that, there was no informal proof of claim. So again, I'm back to if they're going to hold up the bar date order as the basis for denying our claim, then let's find out whether the bar date order is there.

THE COURT: Okay.

MR. WHITE: All right?

THE COURT: That's fair.

MR. WHITE: Okay. Now, so the bar date order refers to four types of claims that it applies to, that applies to that September 2009 bar date. One was a --

THE COURT: Why don't we look at the actual --

MR. WHITE: Yes, yes.

THE COURT: Let's look at the actual bar date order.

(Pause)

THE COURT: I'm not sure --

MR. WHITE: You sort of have to jump around to find the forwards (sic).

THE COURT: Yeah.

MR. WHITE: In addition to prepetition claims.

THE COURT: I'm sorry?

MR. WHITE: In addition to prepetition claims noted in the bar date order that must be filed by the bar date, because the bar date order specified prepetition claims must be filed by the bar date.

THE COURT: Yes. Okay. So you just said the words which are exactly the point.

MR. WHITE: Okay.

THE COURT: Okay? In general terms, the bar order says prepetition claims must be filed by the bar date.

That's what you have, a prepetition claim, period, full stop. That's what you have, and that's where your footnote related to 502(g) so baffled me.

You have a contract that was a prepetition contract that was terminated, and the termination gives rise to a prepetition claim. The bar order required the filing of prepetition claims. That's why the bar order applies to your claim, and that's why it's a late filed claim and therefore, cannot be allowed. So that's the daisy chain that gets us there.

MR. WHITE: Well, I understand, and I've thought about this a lot.

THE COURT: Okay.

MR. WHITE: I'd like to share my thoughts with you.

THE COURT: Okay.

MR. WHITE: Okay? And you might disagree with me.

THE COURT: Okay.

MR. WHITE: Of course, you're the judge, so you get to disagree with me. The bankruptcy code doesn't define prepetition claim, does it? I wish it did. We wouldn't maybe be having this argument today.

THE COURT: You think that there's an actual dispute over whether or not the termination --

MR. WHITE: Yes.

THE COURT: -- of a prepetition contract gives rise to a prepetition claim or a post-petition claim?

MR. WHITE: Yes.

THE COURT: You do?

MR. WHITE: Yes, Your Honor, I do. I do.

THE COURT: Okay.

MR. WHITE: Because of the fact the -- first of all, the only basis for making that conclusion, I believe, is the provision --

THE COURT: Wow, so all the other folks who terminated their safe harbored contracts had admin. claims and --

MR. WHITE: We don't --

THE COURT: -- failed to notice that and should have gone to Lehman and said, under existing law, we had a prepetition derivative contract. We terminated it post-petition, pursuant to the safe harbor. Lucky for us, now we have an admin. claim. Please pay us --

MR. WHITE: No.

THE COURT: -- in hundred-cent dollars.

MR. WHITE: You can't do that because of 502(g).

THE COURT: Okay. So explain your 502(g). So what is 502?

MR. WHITE: Well, 502(g) says that it first -- when it applies to executory contracts that are rejected by

the debtor -- that's part 1, and then, sub-part 2 applies to terminated contracts that are terminated by the non-bankers or counterparty.

THE COURT: Okay.

MR. WHITE: And both of those say that the claim shall be allowed or disallowed as though it was a claim that arose prior to the filing of the petition.

THE COURT: Right.

MR. WHITE: Okay? It doesn't mean the claim was a prepetition claim.

THE COURT: Well, what does it mean, if not that?

MR. WHITE: It's for the allowance of the claim.

THE COURT: Right.

MR. WHITE: As to -- I mean, the --

THE COURT: Right. There's only two possibilities. There is prepetition, and there is post-petition. So first cut this would suggest that it's on the prepetition side. Second issue is on the post-petition side if something -- and this is, you know, just a little bankruptcy, you know, extra. On the post-petition side, just the fact that it's post-petition doesn't mean that it gets treated as an admin. claim. There's got to be a benefit to the estate.

MR. WHITE: I agree with that, Your Honor, yes.

THE COURT: Okay. But, just for the purposes of

your argument, we're dividing the world into pre and post, and this 502(g) on that point says rejected, terminated is pre.

MR. WHITE: Let me ask the Court this question, though.

THE COURT: Okay.

MR. WHITE: If, as Your Honor is inclined to, let's say, rule that a rejected -- excuse me -- the Supreme (sic) Court would say terminated --

THE COURT: Right, terminated.

MR. WHITE: -- contract is a prepetition claim because of 502(g)'s wording, then would not the same rationale apply to executory contractors that are rejected by the debtor? Because those likewise were allowed or disallowed as though they arose prior to filing the petition under part one.

THE COURT: Right, and they are.

MR. WHITE: Right. Now, but, if you look at the bar date order, Your Honor, that we pulled out and am looking at, --

THE COURT: Yeah.

MR. WHITE: -- it specifically also enumerates as one of those four categories, in addition to prepetition claims, guaranteed claims, and derivative claims a fourth claim of executory contract rejections. Well, if executory

contract rejections are nothing more than prepetition claims, as Lehman has contended and as, I'm afraid, Your Honor is agreeing with, which I don't agree with, then why does the Court put in there that rejected executory claimants are also subject to the bar date order includes the entire little section of the order that deals with rejected executory claims? Because, under the logic, Your Honor, that 502(g) makes these claims all prepetition, why even mention executory contract claims?

THE COURT: Well, you know, I can't speculate. I didn't draft the bar order. I've seen a million of them in my day.

MR. WHITE: Right.

THE COURT: Okay? And I think it's not a big stretch to say that the intent of any bar order, the intent of the Lehman bar order was to encompass all prepetition claims, and what lawyers sometimes do in bar orders is add bells and whistles because you want to give particular parties particular types of notice, but you could effectively have had a bar notice in the Lehman case that was far less specific than you did.

As counsel indicated, because of the volume of claims and the volume of information that Lehman was obligated to process, the bar date order was more bespoke than what you might see in another case in order to aid in

the collection of that materials, but there is no doubt that the bar date order entered in this case obligated anybody who had a prepetition claim to file a claim. There is no doubt.

MR. WHITE: We do not at all disagree with that statement, Your Honor. We simply disagree with our claim being classified as a prepetition claim.

THE COURT: Well, if that's --

MR. WHITE: And I understand Your Court's reasoning.

THE COURT: But, if that's the case -- again, if the world is divided into pre and post, then, if you believe you have a post-petition claim, then you would file it as with a request for payment of an administrative claim, and it's not covered by the bar date. I, off the top, don't know whether there was an administrative claim bar order. Sometimes there is. Sometimes there's not.

Sometimes the administrative claim bar order only applies to certain types of administrative claims, not -- or administrative claims in the ordinary course. I don't know the answer to that, frankly, but, if it's not a prepetition claim and it's not covered by the bar order, you ought to file something else and ask the estate to pay that, but, as far as this goes -- and I commend you for it -- you haven't attempted to paint a picture of, you know, real-time,

somebody went through the analysis that you're doing now, and I think that's fatal.

Real-time, nobody looked at this, and that's a shame, and, you know, you've made a really good yeoman's try of trying to come up with a theory, and I'd love there to be a theory, but it would be wrong for me to do that, because the boat was missed several times, and no action was taken all these years, you know, from the time of the filing, then the bar date notice, and then until confirmation until fortunately or unfortunately at that point, somebody realized -- and we won't know the context whether it was an audit or what have you -- that there was this, quote, unquote, "claim."

MR. WHITE: Judge, thank you. I feel like I've had my own moot competition with you today.

THE COURT: It was delightful.

MR. WHITE: And I enjoyed that. Thank you.

THE COURT: Your --

MR. WHITE: I'm sorry you don't agree with us.

THE COURT: -- colleague wants to tell you you didn't make another point.

MR. WHITE: Yes.

(Pause)

MR. WHITE: That's a good point, at least -- it's referring again to the bar date order, Your Honor.

THE COURT: Okay.

MR. WHITE: If you look down at the --

UNIDENTIFIED SPEAKER: That's the notice.

MR. WHITE: Excuse me. I'm sorry. The bar date notice. This is the notice that accompanied the order.

THE COURT: Uh-huh.

MR. WHITE: Okay. Probably the thing that most people read on the order, but anyway, on the first page of the bar date notice, --

THE COURT: Uh-huh.

MR. WHITE: I don't know if Your Honor has this document. It's usually highlighted.

THE COURT: Uh-huh.

MR. WHITE: But it doesn't even use the term prepetition claim. It says when the claim arose.

THE COURT: Right, and that's where

MR. WHITE: So we're jumping (sic) down our due process rights (sic) a little bit here that, you know, the wording wasn't clear so far as claimants whose claims arose after the filing of the petition. They're not being told to file a claim.

THE COURT: Okay.

MR. WHITE: And it's inartful (sic), and, to paraphrase the Court, maybe someone should have done it differently at the time, but they didn't, but that's what

creditors would have seen, and again, if Lehman objecting to our claim is going to rely on these documents, it has to show that they effectively disallow our claim.

THE COURT: Okay, but this is directly where your -- the reason that the language is written that way is not accidental, because that ties into 502(g), because the effect of terminating or rejecting a contract is -- I mean, there are many ways that a claim can arise before the commencement date, right? I delivered stuff to Lehman. Lehman didn't pay for it. I mean, I could go on and on, and the reason 502(g) is in there is to make clear -- and I remember learning this as a new bankruptcy lawyer, because it was not intuitive that, when there was the termination or a rejection of a contract post-petition, it gives rise to a prepetition claim. That wasn't intuitive to me at the time.

But this language, in the hands of thousands and thousands of creditors and contract counterparties, just like your client, reacted by sending in a proof of claim, and I think it would be wrong to construe the bar order in any other way now, and I will tell you that, you know, thousands and thousands of counterparties' clients, lawyers sent in thousands and thousands of proofs of claim that weren't covered by the bar order just because you never take a chance. And again, I don't think, to your credit, you're telling me that, at the time, somebody at Conway or on their

behalf read this and said -- and did that analysis and said, "It doesn't cover us."

Because I think, if they did, you certainly would have picked up the phone to Weil, Gotshal and gotten someone on the phone and said, "Huh, do I have to file a proof of claim"? And they would have said, "I can't give you legal advice. You'd better just protect your clients' rights."

And unfortunately, it didn't happen. It didn't happen in a lot of instances. There are a good number of late filed claims, and again, I think it would be a derogation of my duty to make an exception, even though I'm not really that happy about telling Conway that I can't allow it to file its claim.

So thank you very much, and I would ask that counsel circulate an order sustaining the objection for the reasons that I have articulated here today. All right? Thank you very much, and I apologize for the long wait through the morning.

MR. WHITE: I had no place else to be.

THE COURT: Okay. Thank you.

All right. I think that concludes our morning session; is that correct?

MR. HORWITZ: Yes.

THE COURT: All right. I may see some of you at 2:00. Thank you.

MR. YOUNGMAN: Your Honor, I ask for the Court's indulgence for a couple of moments.

THE COURT: Sure.

MR. YOUNGMAN: We have visiting with us this summer some --

THE COURT: Of course.

MR. YOUNGMAN: -- summer associates. And, if I could give them a chance to talk in court, perhaps they could introduce themselves.

THE COURT: I would be delighted.

Come on up.

(Pause)

THE COURT: We're going to be off the record.

Hi, guys.

(Recess at 12:27 p.m.)

(Reconvened at 2:03 p.m.)

THE COURT: Good afternoon. Please have a seat.

How is everyone today?

UNIDENTIFIED SPEAKER: Good afternoon, Your Honor.

THE COURT: Let me clear off this morning's binder.

Thanks.

Okay. So we have two matters, correct?

MR. SLACK: We do, today, have two matters.

THE COURT: Okay.

MR. SLACK: So, Your Honor, Richard Slack, for the debtors, and the first matter on is the Giants Stadium matter, which is an adversary proceeding 13-01554, and this matter has been before this Court for a number of years, chiefly dealing with 2004 discovery.

THE COURT: Right.

MR. SLACK: This is the first time we've been in front of Your Honor on it.

THE COURT: Okay.

MR. SLACK: And we now have an adversary proceeding filed. So I wanted, in the first instance, to perhaps take just a couple of minutes to tell you a little bit about the case.

THE COURT: Sure.

MR. SLACK: So --

THE COURT: I do know that count one has gone away as a --

MR. SLACK: Count one has been dismissed for the reasons set forth in the mystery (sic) decision --

THE COURT: Right.

MR. SLACK: -- retaining all the appeal rights that we have.

THE COURT: Right.

MR. SLACK: That's right, Your Honor. So LBSF and Giants Stadium were parties to two interest rate swap

transactions -- and I'll just refer to them as the swaps -- that were intended to hedge interest rate risk on auction rate securities issued by Giants Stadium to finance the new Giants Stadium.

The auction rate securities were underwritten by Lehman Brothers, Inc., LBI, at that time, an affiliate of LBSF. LBHI guaranteed LBSF's obligations under the swaps, as it did with many of the swaps that Your Honor, I'm sure, has dealt with already.

Now, under the swaps, under certain circumstances, LBSF agreed to pay Giants Stadium a floating rate, which was identical to the interest rate set on the auction rate securities. These auction rate securities would be auctioned periodically. Whatever that rate was, that would be the rate that LBSF would pay, and Giants Stadium agreed to pay a fixed rate.

Under other circumstances under the swaps, LBSF agreed to pay Giants Stadium a floating rate based on LIBOR, just a different measure, instead of the actual bond rate, and again, in return, Giants Stadium would pay the same fixed rate. And, to mitigate the risks that contracting to pay a floating rate based on the actual rates imposed under certain circumstances, LBSF bargained for a number of provisions, and we talk about these in our complaint, obviously, but two that I want to highlight in particular.

The first was to have a Lehman affiliate, in this case, LBI, act as the auction agent for the auction rate securities, and, of course, the reason for that is is that -- at least we allege in the complaint -- is that, by having an affiliate of LBSF control the auctions, they could control, in many respects, Lehman's risk in paying an actual rate.

So, if the rates were getting too high, it would be in control of the process. It could buy themselves -- there are a lot of things that, as the auction agent, it could do to limit LBSF's risks.

THE COURT: But that wouldn't -- you know, I think if you push in one place, it pops out another, but doing that for the benefit of limiting LBSF's risk -- did that necessarily entail a cost to the counterparty, or --

MR. SLACK: Well, in this instance -- so there's a lot of different things that could happen in order to limit the risk. So one of the things is it controlled, obviously, going out, whether it was --

THE COURT: Right.

MR. SLACK: -- more aggressive, less aggressive, et cetera.

THE COURT: Right.

MR. SLACK: Obviously, the lower the rate that --

THE COURT: Right.

MR. SLACK: -- it was being paid in the market.

THE COURT: Right.

MR. SLACK: The other thing that it could do -- if the rate ever got too high, it would have the ability -- and it would know that -- to, in fact, buy the auction rate securities in. Because, if they bought the auction rate securities in, what happened at that point is that there would be what is called the all-hold rate. So you'd pay whatever you'd have to pay for the bond.

THE COURT: Got it.

MR. SLACK: But, at that point, you'd be paying essentially a LIBOR rate.

THE COURT: Got it. Okay.

MR. SLACK: And, under the swap, you'd have not only eliminated your risk. You'd actually be in the money in most circumstances, because the LIBOR rate was lower than the fixed rate. So again, this was an important protection for LBSF in that.

The second protection -- and let me just finish that first protection. What it said was if there was ever a time when LBI was terminated or replaced in that role, that the swap would change automatically to a LIBOR-based. So the idea, of course, being if we're not going to have the protection, --

THE COURT: Right.

MR. SLACK: -- then we weren't going to have the --

THE COURT: Okay.

MR. SLACK: -- actual rate risk.

THE COURT: Okay.

MR. SLACK: The second protection -- and again, there --

THE COURT: I'll note that your opponent behind you is very subtly shaking his head no. So I'm anticipating that your recitation of this is not entirely going to be agreed to.

MR. SLACK: Well, let me say that I think that what I'm saying is --

THE COURT: I'm just trying to figure out whether I'm in background or I'm in dispute. So I'm guessing I'm in dispute.

MR. SLACK: Well, let me say this, and we're trying to tell you what our claims are.

THE COURT: Sure.

MR. SLACK: And I think everything I've said is, in fact, accurate background.

THE COURT: Okay.

MR. SLACK: I know the parties are going to argue at some point whether or not the valuation of the swap was appropriate based on the, you know, --

THE COURT: Right. You're just trying to tell me mechanics now, right?

MR. SLACK: And, frankly, what's important to us.

THE COURT: Okay.

MR. SLACK: I mean, I'm sure there's a lot of things in the complaint.

THE COURT: Sure.

MR. SLACK: And there are other provisions, but this is --

THE COURT: Okay.

MR. SLACK: These are things that are alleged in the complaint and important to us.

The swaps also included explicit and unambiguous writing for LBSF to require Giants Stadium to refinance the auction rate securities. What this ensured is -- let's say that there was a long-term dislocation in the auction rate market where it was very, very high. What Lehman had the right to do was to essentially require Giants to refinance that and, by refinancing, it would have to pay whatever costs were incurred by Giants Stadium, but it could limit its risks in a huge dislocation market, and again, that was a very important protection for Lehman.

So now, fast forward to the Lehman bankruptcy, and again, just before the bankruptcy, Lehman had sent Giants Stadium statements showing that the value of the swaps was,

just before the bankruptcy, 60 million, roughly, in favor of LBSF, and, when LBHI filed its Chapter 11 petition, Giants Stadium was -- and, you know, we allege this, and we think we can support this -- apparently informed by a contact at Lehman that LBI, which again, was the auction rate agent, was going into a SIPC proceeding, which it, in fact, did a few days later, which would have required, under the rules, LBI's termination and ultimate replacement as auction agent, thus triggering the change in the swap to a LIBOR-based swap.

And again, I don't think there's any disagreement -- if there is, I haven't heard it yet -- that, if the swap was valued as a LIBOR-based swap, Lehman's in the money. We made dicker about how much it's in the money or not, but, if it's a LIBOR-based swap, I think it's pretty clear that Lehman was in the money.

Giants Stadium moved very quickly to terminate the swap, and what we allege -- and this is our allegation -- is that Giants knowingly disregarded our rights under the swaps and that, knowing that LBI was going to go into the SIPC proceeding, they essentially tried to freeze time by beating LBI's SIPC proceeding.

So a day before the SIPC proceeding, Giants Stadium terminated the swap, and again, what we allege, based on emails -- and there are some very specific ones we

have in our complaint -- that they understood that, in their mind -- and we don't think they're right -- that, if they didn't terminate before the SIPC proceeding, that this would end up being a receivable for the estate. It would be in the money to the estate.

THE COURT: What was the basis on which they terminated before the LBI filing?

MR. SLACK: The LBHI's filing.

THE COURT: The LBHI filing.

MR. SLACK: So, before LBSF's filing, they filed based on the LBHI filing. As is typical in almost all of the swaps, --

THE COURT: Right.

MR. SLACK: -- the LBHI filing was --

THE COURT: Triggered the --

MR. SLACK: -- an event of default --

THE COURT: -- default. Right.

MR. SLACK: -- under almost all of the swaps that we had.

THE COURT: And so, that is a fact so that the LBHI filing did create an event of default.

MR. SLACK: Yes.

THE COURT: So what is your allegation as to why -- even if we accept as true that they knew what was coming and wanted to avoid that, why is it that they weren't

permitted to terminate?

MR. SLACK: They were permitted to terminate, you know, and had they --

THE COURT: Okay.

MR. SLACK: -- terminated, you know, properly -- they were -- and, you know, went through the -- they were entitled to terminate.

THE COURT: Okay.

MR. SLACK: This is really a valuation dispute, Your Honor, --

THE COURT: Okay.

MR. SLACK: -- about once they terminated, what's the value of the swap and who's in the money.

THE COURT: Got it.

MR. SLACK: And, as you'll hear, there's a big gap in that valuation dispute. So what we allege is that a proper way to value this -- and this is sort of a big picture. I know Your Honor's had some valuation disputes, and this is not easy stuff, but essentially, the world isn't static. So, when you have a swap -- okay? Let's take a plain interest rate swap.

You don't look at the interest rate today and apply that if the life of the swap was 36 years, what the interest rate is today. You have swap curves and say here is what we think the interest rate's going to be over time.

THE COURT: Right.

MR. SLACK: Essentially, it's a projection over time --

THE COURT: Right.

MR. SLACK: -- of what's going to take place. What Giants Stadium did here is they looked at the displaced auction rate market. They took the prices that went off right after Lehman's bankruptcy, and they applied those for 36 years. What we say should have been done is you can't just freeze time and say okay, we beat the clock.

You have to look -- if you knew, for example, that LBI was going to go to its SIPC proceeding and therefore, that this was going to change from an actual rate swap to a LIBOR-based swap, then you'd have to take that into account, and we expect that Giants is going to disagree with that, and that's going to be a very big dispute that we're going to have. But we think that that's fundamentally how swaps get valued.

So what Giants did is that, two weeks after they terminated, they filed a calculation statement saying they were owed 300 million. They filed proofs of claim with respect to those saying that they were owed 300 million, and let me back up one second. You know, so that's sort of where we are in the complaints.

Procedurally, as I said, we had --

THE COURT: So the bid in the ask (sic) is 300 going this way, 100 going the other way?

MR. SLACK: Essentially, you know, with some small variation.

THE COURT: Okay.

MR. SLACK: I think that's essentially right. So we took 2004 discovery not too long after the bankruptcy. At some point during that process, Giants Stadium asked to take discovery, and that process ended up with a discovery protocol that we agreed to with Giants Stadium where we provided information to them and they provided information to us, and together the parties have produced over a half a million pages of documents already.

There were third party subpoenas that were issued to people like the Monoline (ph) insurers that insured these instruments as well as the NFL and others, but again, there has already been about 400,000 pages of documents produced from third parties. So there's been today, up to today really a great deal of document discovery. I mean, while there may be some disputes that have not yet gone to the Court, I would say the large majority, if not really the overcoming vast majority of the documents discovery, has been completed.

So, in October of 2013, we filed our adversary proceeding. At some time prior to that, Giants had filed,

as I said, their claims for 301 million. We have filed and had filed -- or I should say -- let me -- I missed a step.

Giants Stadium, after they had filed the 300 million claim, about three years later filed an amended claim. We filed our objection to that amended claim, which had raised the amount they sought from 300 to approximately 600 million.

We filed our adversary proceeding. They filed a motion to dismiss. As you pointed out, Your Honor, we presented the Court with a stip a couple of weeks ago that dealt with sort of both of these issues, and that is, as we said, the motion to dismiss was resolved the way Your Honor had said, but we also resolved in that that Giants Stadium agreed to withdraw their amended claims and essentially reinstate the original claims of 300 million, which is why we're still at the 100 to 300 million.

So the good news is at the status conference, Your Honor, is that we have worked out -- and I think we have actually worked cooperatively together with Giants. So we've worked out a proposed scheduling order for Your Honor, which I'd like to hand up.

THE COURT: Please.

Thank you.

MR. SLACK: Just to walk you through it, Your Honor, we've agreed on a couple of things. The first

thing is is there's a -- consistent with the stipulation from a couple of weeks ago, we've embedded in here the timing -- if you look to paragraphs five and six. We've embedded the timing for the filing and serving of new objections to their original proofs of claim.

Essentially, that should skinny down what we filed the last time, because they'd withdrawn the amendment. So the hope is that that will skinny that down a bit, and then, Giants has 45 days from there to reply to that objection.

At the same time, Giants -- now that the motion to dismiss is resolved, Giants will file an answer by September 8th, 2014 and additional disclosures by November 3rd and --

THE COURT: Let me stop you on the answer, because it says answer, defense, or counterclaim. The counterclaim is simply the proof of claim, right?

MR. SLACK: Well, you're asking the wrong person, but I would imagine that that's what we're talking about. I know we've had some discussion, which is why it says appropriate defense or counterclaim, because it's certainly our view that there can't be a new counterclaim here.

THE COURT: Well, that's what I'm trying to figure out. I mean, that's why I asked the bid and ask question.

MR. SLACK: Right. So I think you're asking the wrong person.

THE COURT: Okay.

MR. SLACK: But that's certainly --

THE COURT: Okay.

MR. SLACK: -- the view that we have.

THE COURT: Okay.

MR. SLACK: The next really salient date here is the April 1st, 2015 date, which would be the conclusion of fact discovery. What I expect is going to happen over the period of discovery is we're going to take depositions, which can commence here by December 8th, but also finish up any document discovery with third parties and each other. There may be some discovery motions. Again, we worked cooperatively, and maybe we'll get rid of those, but we do have some disputes that are bubbling right now.

We then have a period for expert discovery, which I think is again pretty standard kinds of timing there, which are 12, 13, and 14. The one piece that we left blank for Your Honor was to set a conference so that, after we get expert discovery, I think the idea would be to have a conference with Your Honor where we would discuss whether the parties are going to make summary judgment motions and setting a trial date at that time.

So, you know, obviously from our standpoint, we would be prepared to meet essentially any time after the expert witness date here that's convenient for the Court in

order to have that conference. One other point --

THE COURT: Well, it might be premature, especially since I haven't heard from counsel for Giants yet, but I'll say it anyway. The likelihood that this is going to be amenable to summary disposition, I would say, is pretty minimal.

MR. SLACK: Well, that's why I said if any at the time.

THE COURT: Right.

MR. SLACK: And I think we'll have to see. There may be -- you know, not speaking out of turn, but, you know, there may be discrete issues that, in fact, we can have summary judgment on or not.

THE COURT: Right.

MR. SLACK: So I think, you know, that's something that the parties will have to think about.

THE COURT: Right. Or, to the extent that you can -- you know, you would agree to certain stipulated facts, and then, there would be trial on at least a partially stipulated record or something like that.

MR. SLACK: Right. One more thing which we've agreed to and I think, frankly, makes some sense is we've agreed that, even though this is in the adversary proceeding, that we will take discovery that'll apply both to obviously the claims and the adversary proceeding.

THE COURT: Sure, right.

MR. SLACK: And I would think that the parties will continue to talk about them, whether these will be tried together or not, but that's something that will be down the road. But, at least for discovery purposes, I think we all agree that it makes complete sense to take the discovery together.

THE COURT: Right, right. I mean, not to make a bad pun about goal posts, but it seems to me that we would want to do it in one proceeding to determine, you know, which goal post or if there's a scenario -- I'm not smart enough on the issues yet to know if there's going to be -- if there's possibility of something in between as there might be in a normal valuation trial, which this, you know, is anything but.

MR. SLACK: And again, I think that reaction is a common sense one that, you know, after we get a chance to look at the discovery and the depositions, --

THE COURT: Right.

MR. SLACK: -- will probably crystallize.

THE COURT: Okay. Okay. I would say --

MR. SLACK: So, with that, I think that's --

THE COURT: Yes.

MR. SLACK: -- really where I think we are, and I think the good news, again, is that we've been able to work

out this discovery schedule and work out some of the intricacies of --

THE COURT: Okay.

MR. SLACK: -- discovery that are in here and --

THE COURT: Okay. So what I would suggest to you -- and then, I'll hear from counsel for Giants -- is that, rather than give you a date now when it's a year away and who knows what other conferences and what not or trials I might have, why don't we leave it that a year from now, when we're at the completion of the experts -- why don't you contact chambers, and we'll just give you a date at that time when our calendar is more settled?

MR. SLACK: Perfectly acceptable. Thank you, Your Honor.

THE COURT: All right. And obviously, in the meantime, if there's something on which you need our assistance, we'd be happy to hear from you.

MR. SLACK: Great. Thank you.

THE COURT: Okay. Thank you.

MR. SLACK: By the way, I have a disk. Can I hand the disk up as well?

THE COURT: Sure. Shall we -- then we'll just amend paragraph 16 to say subsequent to the completion of the discovery of expert witnesses, the Court shall set a mutually convenient time for a conference or something like

that.

MR. SLACK: Thank you. Thanks.

MR. SCHWARTZ: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. SCHWARTZ: Matthew Schwartz, for Giants Stadium.

THE COURT: How are you, Mr. Schwartz?

MR. SCHWARTZ: Well, thank you, Your Honor. Thank you.

Your Honor, I don't have any disagreements with what Mr. Slack said as to the scheduling order that we've proposed.

THE COURT: Okay.

MR. SCHWARTZ: You won't be surprised, as you get from my reaction, that I found his background statement to be more in the venue of an opening statement. I think it is important, since this case is new to Your Honor, to give a little more context and a little more background to the transactions here.

THE COURT: Okay.

MR. SCHWARTZ: Giants Stadium was originally looking to finance its half, and the Jets would finance their half of the new Meadowlands Stadiums back in the summer of 2007. Giants Stadium originally was going to do the entire financing through Goldman Sachs, and it was going

to issue floating rate notes, and it was going to have a swap on those notes to hedge Giants Stadium's risk that interest rates spiked in the near future.

Not just in the near future, Your Honor. These were 40-year notes. So the financing was done over four decades.

THE COURT: Okay.

MR. SCHWARTZ: What happened is Goldman Sachs offered Giants Stadium a partial tenant sheet (sic). It said we are not going to sort of insure you for the entire amount that the interest rate rises on these bonds.

THE COURT: Uh-huh.

MR. SCHWARTZ: But we'll simply give you a hedge where you pay us a fixed rate, and we will pay you a floating rate based off of LIBOR, and the thought was, at the time, that, if the LIBOR rate went up, then the interest rates would go up somewhat intangibly.

Lehman Brothers had been sort of advising Giants Stadium on the side, and literally, the day before the financing went into effect, it swooped in, and it told Giants Stadium we will give you exactly what you are looking for, a complete hedge on your interest rate risk. So whatever the interest rate is on the auction rate bonds that you issued, we will pay you that rate, not just LIBOR, but that rate.

Giants Stadium said great, and it financed $408 million of the over $600 million with Lehman Brothers because of that promise. And what did Lehman Brothers get in return? What Giants Stadium paid to Lehman Brothers for that additional protection beyond what Goldman Sachs was going to pay Giants Stadium -- it paid Lehman Brothers a premium of $31 million for that protection.

What happened is, of course, as Your Honor knows, the 2007 financial crisis starts to develop. Auction rate securities, interest rates spike immediately. Lehman Brothers -- from discovery, we know that they recognize this as a crisis for them immediately, especially in regards to the Giants Stadium bonds, and they did everything that they could to figure out a way to get themselves out of the situation and out of the incredible payments that they had to make to Giants Stadium because of those spiking interest rates. In other words, almost within a few months, Giants Stadium was getting exactly the protection for which it paid Lehman the $31 million premium.

Since then, Lehman -- and, since the bankruptcy, Lehman has been looking for every single possible way to get out of the fact that this was a business deal that moved significantly in Giants Stadium's favor, and I'll just address a couple of the points that Mr. Slack made.

The first is this idea that, if anything happened

to Lehman Brothers, Inc. as the broker/dealer and they were no longer the broker/dealer, that, all of a sudden, the swap would transfer from an actual bond rate swap in which Giants Stadium was significantly in the money to a LIBOR rate swap in which Lehman claims to have been in the money. A few things.

The language of that entire paragraph says specifically that Giants Stadium is not allowed to terminate Lehman Brothers, Inc. as the broker/dealer, but, if Lehman Brothers, Inc. is terminated or replaced as broker/dealer, then the swap transfers from an actual rate swap in which Giants are in the money to a LIBOR rate swap. The concept that terminated or replaced that language, especially within the provision, the entire provision of the contract, means that a voluntary resignation on Lehman Brothers, Inc.'s part as broker/dealer on the bonds somehow transfers the swap from one that is dramatically in the money to Giants Stadium to a LIBOR rate swap is not only wrong based off of the clear language -- terminated or replaced clearly means if Giants Stadium is terminating or replacing LBI. LBI is the object of that termination or replacement, not the subject.

It goes completely against the intent of the parties, and we know that from discovery, and we know -- and, frankly, I'm surprised, because I think that Lehman knows that its own people who negotiated the swaps and the

terms of its swaps agree with Giants Stadium's legal position on this, and it would make absolutely no sense in the business context of this swap. Because what it would do is, as soon as Giants Stadium went in the money and Lehman Brothers started losing money on this swap, it would give Lehman, as an overall organization, the unilateral right to convert this swap from one in which Giants Stadium is dramatically in the money and paid $31 million for that protection to one in which Lehman supposedly is in the money, simply by having LBI resign as broker/dealer.

The text, the intent, and the overall context makes absolutely no sense that LBI's voluntary resignation or even if it was forced to resign as part of the SIPC liquidation could affect Giants Stadium so materially is completely wrong, and it's one of the unfortunate arguments that we've been dealing with throughout this litigation.

One of the things he talked about is the valuation, and he said look, Lehman had the right to force Giants Stadium to refinance from auction rate securities into fixed rate securities, and I want to talk about that for just a second. The first thing is that Lehman Brothers tried for a long time to arrange -- and they had the obligation to make that arrangement -- to have Giants Stadium refinance from ARS into some other form, and they were unable to find the liquidity that they needed to

effectuate that change.

Worse for them, Your Honor, this argument has already been made before this Court when Judge Peck was presiding over this case. What happened is is, upon Lehman Brothers' bankruptcy, LBI held the Giants Stadium bonds on its books. It held $408 million worth of Giants Stadium bonds, and it sold those bonds to Barclays for about $50 million.

Lehman Brothers challenged that sale as commercially unreasonable, and Judge Peck ruled against Lehman Brothers and found that that $50 million price on those bonds at that point in time was a commercially reasonable amount, and he refused to have any sort of rescission on that transaction. That $50 million, when you do the valuation and you consider their idea that Giants Stadium should have had to refinance into a long-term, 40-year bonds effectively means that Giants Stadium's value on the swaps was not $301 million, like we had claimed, but, in fact, was about $350 million, and that was simply something that Judge Peck found as a commercially reasonable number.

It could have been a much lower number and still been commercially reasonable. So we have numerous disagreements, Your Honor.

Another disagreement that we've dealt with, which you'll see in the papers -- and unfortunately, of course,

you have their papers, but we're having this conversation with you before you have our papers. So I just want to preview one or two other arguments that we've been dealing with.

Because Lehman, obviously, was a sophisticated broker/dealer and Giants Stadium is a family-run sports enterprise, part of the contracts in the swaps said that, upon a termination of the swaps, each side would provide two names of reference market makers, effectively large financial institutions, and Lehman Brothers would go out, and it would get the quotes and would use those quotes to value the swaps. What happened upon the bankruptcy of Lehman Brothers, when Giants Stadium sent in its termination notice, is Giants Stadium also contacted their primary contact at Lehman, and they said here are two names, and we would like you to go out and fulfill your contractual obligations.

The response they got was it is chaos here because of the bankruptcy. There is nobody who can do this. Go out and do it yourself.

So Giants Stadium went out -- and, for purposes not of fulfilling anybody's contractual obligations under the swaps, but for purposes of trying to get some rough value of the what the swaps were at that time, it went out, and it sought valuations from people, and it got laughed at.

People refused to give them any kind of valuation on these swaps, given how unique and how potentially risky they were from any counterparty stepping into Lehman's shoes.

Lehman's response, if you read its adversary complaint in its objections is, by doing that, Giants Stadium denied Lehman its contractual right to go out and to seek those market quotations from the other -- from the reference market makers. It's an absurd response, Your Honor. Not only has giants Stadium tried to get Lehman to do that, not only did Lehman say it wasn't able to do it, but Giants Stadium never prevented Lehman Brothers from doing anything, and it's --

THE COURT: Is the statement that -- and I don't know if I'm mixing apples and oranges, but, when you talk about the swap curve over 36 years or what have you, is the statement true that you took those points and you -- so we have chaos, right?

MR. SCHWARTZ: Right.

THE COURT: So, as a matter of common sense and fully admitting that I'm not educated on these issues yet, it would seem to me that you wouldn't want to take those chaotic days of chaos numbers and roll them out over a swap curve, because inevitably, the chaos is going to abate. So is what I was told -- that you did take those numbers and roll them out and that's how you got your valuation?

MR. SCHWARTZ: So what happened is Lehman had not been putting the swaps out to market because the numbers that they were getting were so terrible for them that they had kept them themselves.

THE COURT: Okay.

MR. SCHWARTZ: Goldman Sachs had been putting the bonds out to market. Some of those bonds were insured by a company called Fidget (ph), and some of them were insured by a company called FSA, which has now assured guarantee.

Goldman Sachs had been getting numbers consistently on those bonds in the about ten percent range. They had been getting slightly higher numbers for Fidget because Fidget was worse (sic) credit than FSA. All of the Lehman bonds were insured by Fidget.

So what Giants Stadium did at the time with no idea about whether the auction rate securities market would ever come back -- because again, you have to value it at the time, and, in fact, I think there's good evidence that the auction rate securities markets, especially for the Giants Stadium bonds, haven't come back, Your Honor. It took the Goldman Sachs numbers and it applied a small premium, a very conservative premium for the fact that Fidget had a much worse credit rating than FSA.

I think, Your Honor, that this was a very conservative number. It's showed by the fact that

Judge Peck found that $50 million to be a commercially reasonable number. It was done at the time when there was no understanding whatsoever about whether or not auction rate markets for 40-year covenant-like (sic) bonds for a project finance would ever come back, and it was done also with consideration for if Giants Stadium had to issue new debt at that time, 40-year debt, covenant-like for a project finance fixed rate, what type of rates would it get, and we're quite convinced obviously all this is going to be subject to a lot of expert valuation.

THE COURT: Right.

MR. SCHWARTZ: As, of course, was the valuation that was done in the Barclay's/Lehman matter, but we're quite convinced that this is a conservative estimate and that we have internal -- you know, Mr. Slack referred to the fact that Lehman was showing $60 million in their --

THE COURT: Mr. Slack has a big smile on his face.

MR. SCHWARTZ: I doubt I hear it.

THE COURT: Just as a counterpoint to your nodding and --

MR. SCHWARTZ: But we have internal Lehman documents that show that Lehman acknowledged months before Lehman Brothers went bankrupt that this swap was saving Giants Stadium hundreds of millions of dollars, Your Honor. So Mr. Slack and his experts can, after the fact, try to

challenge Judge Peck's decision and kind of try to challenge what Lehman Brothers was acknowledging internally, but that's the basic facts, and I think that they'll be shown quite clearly, both with fact discovery and through expert discovery, Your Honor.

THE COURT: Well, I feel like we've gone from opening arguments to closing arguments in a matter of 20 minutes.

MR. SCHWARTZ: Fair, Your Honor.

THE COURT: So this is --

MR. SCHWARTZ: I was just here for a scheduling conference, Your Honor.

THE COURT: It's extremely, extremely fascinating.

Let me just ask one question to you both, and you'll excuse my ignorance if you already had this conversation with Judge Peck or between each other, but I know, given we're on a path. I'm happy to go down that path. Happy to have summary judgment and/or trial, you know, a year or so from now. But is there any point or utility in talking about any sort of a mediation process?

MR. SCHWARTZ: So, Your Honor, the parties have gone through a formal mediation process.

THE COURT: You have?

MR. SCHWARTZ: And they also have gone through informal discussions.

THE COURT: Okay.

MR. SCHWARTZ: The principals know how to reach each other.

THE COURT: Okay.

MR. SCHWARTZ: And they are in contact, as appropriate. Of course, we'll always take guidance from the Court, and we are always looking for ways to resolve this on what we think are proper terms.

THE COURT: Okay.

MR. SCHWARTZ: But that is the history behind it. We held a one-day mediation with Judge Mabey under the ADR process.

THE COURT: You did?

MR. SCHWARTZ: Yes.

THE COURT: Okay.

You agree with that, Mr. Slack?

MR. SLACK: I didn't hear it.

MR. SCHWARTZ: We held a one-day --

THE COURT: A one-day mediation with --

MR. SCHWARTZ: -- mediation with Judge Mabey --

THE COURT: -- Judge Mabey.

MR. SCHWARTZ: -- that involved formal submissions. Without going into any of the details of the medication, obviously, we're still here with you.

MR. SLACK: I completely agree that the parties

have mediated and have talked to each other, know how to reach each other.

THE COURT: Okay.

MR. SLACK: I would say that it doesn't mean that, as discovery goes forward, my client --

THE COURT: Sure.

MR. SLACK: -- wouldn't be willing to go back and try again.

THE COURT: Okay.

MR. SLACK: But, you know, I think Mr. Schwartz is right that there have been attempts to -- and I think both parties have tried to at least talk to each other.

THE COURT: Okay. All right. So we'll enter the scheduling order. We'll look forward to seeing you in a year or so, if not earlier.

MR. SCHWARTZ: I'm afraid you might hear from us earlier, Your Honor. You never know.

THE COURT: Okay.

MR. SLACK: I would like to make a comment, and, you know, obviously, that was a long argument there, but the answer to your question about whether they took a number and applied it over time, --

THE COURT: Yes, which Mr. Schwartz very cleverly did not answer.

MR. SLACK: -- was yes.

MR. SCHWARTZ: No, that is what Giants Stadium did, Your Honor.

THE COURT: Okay.

MR. SCHWARTZ: That is correct. Okay. Thank you.

THE COURT: All right. Thank you both very much.

All right. So that brings us to finally Moore Macro Fund.

MR. EILENDER: Good afternoon, Your Honor.

Your Honor, do you have a preference as to where you would like --

THE COURT: I don't. Wherever you're comfortable is fine with me.

MR. EILENDER: Do you want the trustee's representative to speak first or plaintiff? Typically, it's the plaintiff, but --

THE COURT: I'm very flexible.

MR. EILENDER: Would you like to go first?

UNIDENTIFIED SPEAKER: Sure, go ahead.

MR. EILENDER: I'll try not to give an opening statement. I know this is a scheduling conference.

THE COURT: right.

MR. EILENDER: Your Honor, good afternoon.

THE COURT: Good afternoon.

MR. EILENDER: Jeffrey Eilender, from Schlam Stone & Dolan. I have with me my partner Bennette Kramer, from

Schlam Stone & Dolan.

THE COURT: Okay.

MR. EILENDER: I'll start with the most important thing for today. The parties have agreed to a scheduling order.

THE COURT: Okay.

MR. EILENDER: And I have a copy of it. It's my own copy. If you allow me to approach, Your Honor.

THE COURT: That would be great. Thank you. Thank you.

MR. EILENDER: Thank you.

I'll start with the schedule first, and then, I'll do a background. We've agreed that we will get fact discovery resolved in less than six months, January 2015. I think this is a case where there will be a lot of expert discovery. So the expert discovery will be proceeding in the spring 2015, and we have agreed the case basically should be ready, I think, by May of 2015. So I don't think there's going to be a lot of issues about the schedule.

We've agreed that we're going to start propounding requests to each other by the end of this month, including automatic disclosures, and we've agreed that we're going to start taking depositions even without document production.

THE COURT: Okay.

MR. EILENDER: This was a request by the trustee's

counsel. You know, we've also agreed -- this a point very important for me -- that, if depositions do occur before document production is complete, absent some misconduct relating to depositions, witnesses are not going to be produced again.

THE COURT: Again? Okay.

MR. EILENDER: I mean, the fact that someone's documents were not produced -- if you're going to take that witness, you're doing it at your own risk.

THE COURT: Okay.

MR. EILENDER: So, in terms of the discovery, I think we're set. One thing Your Honor should know -- we've made a motion to withdraw reference.

THE COURT: I do know that.

MR. EILENDER: The case was assigned to Judge Pauley. I think we made a motion two or three weeks ago. I, frankly, don't remember when the opposition is due.

THE COURT: Okay.

MR. EILENDER: And I don't know how fast Judge Pauley is. My guess is that the earliest that would be resolved would be the fall.

THE COURT: But, in any event, you folks are just going to keep going?

MR. EILENDER: Yes.

THE COURT: Pursuant to the schedule, while

Judge Pauley considers what to do?

MR. EILENDER: Yes. I mean, unless Judge Pauley tells us something else, yes, Your Honor.

THE COURT: Right. Okay.

MR. EILENDER: The other thing Your Honor should know -- and I'm not committing to anything, but we are considering making a motion to dismiss the counterclaims. We're exploring that, and I think currently our motion or our response, I think, is due at the end of August. We may try to get --

THE COURT: Okay.

MR. EILENDER: -- a little more time after Labor Day, because I would like to go to Cape Cod at the end of August.

THE COURT: Who wouldn't?

MR. EILENDER: So --

THE COURT: Okay. All right.

MR. EILENDER: So, in terms of logistics, I think we're set. I don't know --

THE COURT: Just let me observe that paragraph five, as I said in the earlier conference, if you were listening. It says dispositive motions to be filed no later than July 24th. That should not be read to reflect my agreement that, in fact, you'll be filing dispositive motions. So we can talk about it at that point, if I still

have the case.

MR. EILENDER: Now, there is another issue which I do not believe is an issue, and I'm going to assume it's not an issue. The way this thing began is the trustee, through the various debtors, was trying to take 2004 discovery from the plaintiffs before they were plaintiffs. We filed a declaratory judgment action. Our position is that that trumps the 2004 discovery. Discovery should be taken through the litigation.

There was some disagreement about that at one point, but, given that we have this scheduling order, I'm assuming there is no more disagreement. Whatever discovery will be taken will be taken pursuant to the federal rules ad not through 2004.

THE COURT: I would think so.

Is there any disagreement in that regard?

MR. TAMBE: There's no disagreement. It's just our preference would certainly have been that they responded to the 2004 discovery in a timely manner. They didn't. They sued. We are where we are, and we'll proceed with discovery.

THE COURT: Okay. Okay.

MR. EILENDER: And I don't want to be pedantic, but we did respond to 2004 in a timely manner.

THE COURT: Okay. We're --

MR. EILENDER: We objected, and that's a response.

THE COURT: All right. So it's water under the bridge.

MR. EILENDER: Yes, Your Honor.

THE COURT: We are where we are.

MR. EILENDER: Look, I don't want to take up your time. It's the afternoon. It's the summer.

THE COURT: It's fine.

MR. EILENDER: So I don't know how much --

THE COURT: This is my job.

MR. EILENDER: Okay. Well, I don't know how much you want to know, and, you know, I don't want to give a long speech, but, in essence, what the case is about -- the entities that I represent are funds. They engaged in swap agreements with the Lehman entities, primarily special financing and LBCC. Holdings was guarantor under the swap agreements. These were ISDA master agreements.

When Holdings filed for bankruptcy in September of 2008, that was an event of default. My clients elected to terminate the agreements, which caused a cascade of events. The cascade was then transactions were terminated. They have to be valued.

Some of my clients were in the money. Some of them were not. Before, you know, LBSF filed for bankruptcy at just the beginning of October of 2008, my clients engaged

in agreements with each other where, as the clients who were in the money, assigned their rights to the clients who were not in the money, and then, they asserted setoffs against LBSF and, to a certain extent, LBCC.

For years -- and after doing that process and after determining what they owed, they paid LBSF $60 million or a smidge less than $60 million. Basically, for years, nothing happened. I mean, that's a slight exaggeration, but I don't think it's too great of an exaggeration.

You know, there's some noises from Lehman. Well, we may have some problems with your valuations of the margins, but, I mean, nothing substantive was said to our clients.

THE COURT: Meaning nothing substantive with respect to the transactions that created the setoff rights?

MR. EILENDER: Right, that's correct, and then, fairly recently, you know, suddenly, it's your assignments are invalid, the setoffs are invalid, your math is way wrong, your math is unconscionable, it violates this, it violates that, and plus, we're going to charge you a default interest rate of 13 percent because you are the defaulting party on the agreement. And, needless to say, my clients object to all that, and, needless to say, they just don't want to sit around waiting to figure out if they enormous liability or if they don't.

I mean, under Lehman's view of the world, at least before they filed their counterclaims --

THE COURT: Right.

MR. EILENDER: And we were told my clients owed them something like $20 million, and the number may now be higher. I haven't done the math since they filed their pleading.

THE COURT: Then, why is it that you want to leave this Court where you get a speedy disposition?

MR. EILENDER: Because I'm a commercial litigator. I want to be where --

THE COURT: I have commercial litigators who appear here and win here and sometimes lose here all the time.

MR. EILENDER: You know, --

THE COURT: We love commercial litigators here.

MR. EILENDER: Your Honor, I like to be where I'm familiar. But look, who knows what will happen? We may end up here one way or the other. Obviously, nothing personal.

THE COURT: Nothing personal taken.

MR. EILENDER: Okay. So --

THE COURT: There are many, many dozens of lawsuits just like yours who were taken care of right here. So --

MR. EILENDER: Or elsewhere or wherever they're

taken care of. Ultimately, everything's taken care of, one way or another.

THE COURT: Correct.

MR. EILENDER: We have filed a declaratory judgment action. We're seeking a declaratory judgment that the assignments were valid, the setoffs were valid, and the calculations are correct. Primarily we were dealing with LBSF, but, for some reason, Holdings, who was just a guarantor, wanted us to sign a tolling (sic) agreement with them, and then, they ultimately filed the counterclaim. It's not clear what Holdings' claim could be, but we're also looking for declaratory judgment action that none of these Lehman entities have any other kind of claims. Let me get this resolved and get closure.

Without getting too much into the weeds, the Lehman -- the trustee's arguments are basically that the assignments and setoffs violate the ISDA contracts, that supposedly we represented we didn't have affiliates and because we purport that we made that representation. Therefore, we could not enter into agreements with affiliates.

They argue that the assignments and setoffs somehow violated the bankruptcy code, even though there's a carve-out for the assignments with regard to these kinds of agreements. I mean, you know, conceivably there's some

issues that, you know, do involve the code. There are other issues that are basically, you know, garden variety contracts, which is really looking at the ISDA agreements and determining what they say.

THE COURT: Okay.

MR. EILENDER: I mean, that is basically it. I mean, there's more to say, but, as I said, I don't want to belabor this, Your Honor.

THE COURT: Okay. Thank you very much.

MR. EILENDER: Anything else?

THE COURT: That's it.

MR. TAMBE: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. TAMBE: Jayant Tambe, Jones Day, for the debtors. While I disagree with some of the words used, I don't disagree with the fact we have a conflict. We have a dispute. We have a dispute about valuation, and we have a dispute about the effectiveness of the purported assignments.

We'll has that out. There'll be discovery.

THE COURT: Okay.

MR. TAMBE: There'll be legal argument. They have said now that they might move to dismiss, and we'll see their arguments, and we'll brief that.

THE COURT: Okay.

MR. TAMBE: One other point that we have discussed with them is mediation. This counterparty has not been through mediation with Lehman, and so, I think we're in agreement that we would like to try mediation.

THE COURT: Is that so --

MR. TAMBE: We need to discuss the mechanics of it.

THE COURT: Is that true?

MR. EILENDER: We agree that we want to do mediation where sort of agreement around issues is staying or not staying. I think what we would like to do is we would like --

THE COURT: Staying meaning staying your schedule?

MR. EILENDER: Exactly. I think what we would like to do is we're happy to engage in mediation, but we want to proceed on the schedule.

MR. TAMBE: Yeah, there's agreement on that as well, yeah.

THE COURT: Okay, okay. So do you have an agreement on how to pick a mediator?

MR. TAMBE: No, we don't. So we have to talk through those issues, and we'll do that. I know there's a couple of standing orders in place. Whether this fits into one of those is unclear, but we can --

THE COURT: I'd be happy to help you in that

regard.

MR. TAMBE: Right, Your Honor, and we may take you up on that, if we have any trouble basically (sic) here (sic).

MR. EILENDER: No issue with that, Your Honor.

THE COURT: Okay. All right. I think it's -- I mean, the way the issues have been described to me, it sounds like it might be a good candidate for mediation. Whether it be successful or not, who knows, but I'm a fan of mediation. So --

MR. TAMBE: So are we, Your Honor.

THE COURT: Okay.

So just let me quickly glance at the scheduling order to see if there's anything that jumps out. I would simply add, in that paragraph five -- well, I just would like to have some clarifying language that this is not giving you permission to file dispositive motions.

So why don't I say subject to compliance with Local Rule 7056(1), dispositive motions, if any, shall be filed no later than July 24th?

Is that all right with you?

MR. TAMBE: That's great, Your Honor.

THE COURT: Is that all right with you?

MR. EILENDER: That's fine. And, Your Honor, typically do you only allow one dispositive motion?

THE COURT: Typically, people don't -- are you counting a motion to dismiss as a --

MR. EILENDER: No, I'm not, Your Honor.

THE COURT: -- dispositive motion?

MR. EILENDER: I am not, Your Honor.

THE COURT: I'm not. So no, I mean, any -- I don't know quite how to answer your question. If it's multiple summary judgment motions, any summary judgment motion is subject to that rule, but, if you believe you have more than one, you can ask more than once. Does that make sense?

MR. EILENDER: Yes, Your Honor.

THE COURT: Okay.

All right. So we'll make that slight change, and then, we'll enter this on the docket.

MR. EILENDER: Would you like a disk, Your Honor? I don't have one here, but --

THE COURT: If we don't have it by email, if it's easier just to send it to our chambers, email, okay.

MR. EILENDER: We'll just email it. Okay.

THE COURT: Okay. And, if you want to then make that change for us, then that would be lovely.

MR. EILENDER: Yeah, we'll do that.

THE COURT: Okay. All right. Thank you for coming in.

MR. EILENDER: Thank you. We were shorter.

THE COURT: Have a -- enjoy the rest of your afternoon.

MR. EILENDER: Thank you.

(Whereupon these proceedings were concluded at 2:53 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N

We, Dawn South and Nicole Yawn, certify that the foregoing transcript is a true and accurate record of the proceedings.

Dawn South

Digitally signed by Dawn South
DN: cn=Dawn South, o, ou, email=digital1@veritext.com, c=US
Date: 2014.07.18 11:48:42 -04'00'

_____

Dawn South

AAERT Certified Electronic Transcriber CET**D-408

Nicole Yawn

Veritext

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: July 18, 2014